

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

UNITED STATES
~~COURT OF APPEALS FOR THE~~
DISTRICT OF COLUMBIA

IN THE

FILED MAY 11 1936

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA

APRIL TERM, 1936.

CLERK

UNITED STATES,

v.

BENEDICT M. McNEIL

815

Appeal No. 6610

Criminal No. 53,442.

BRIEF OF APPELLANT.

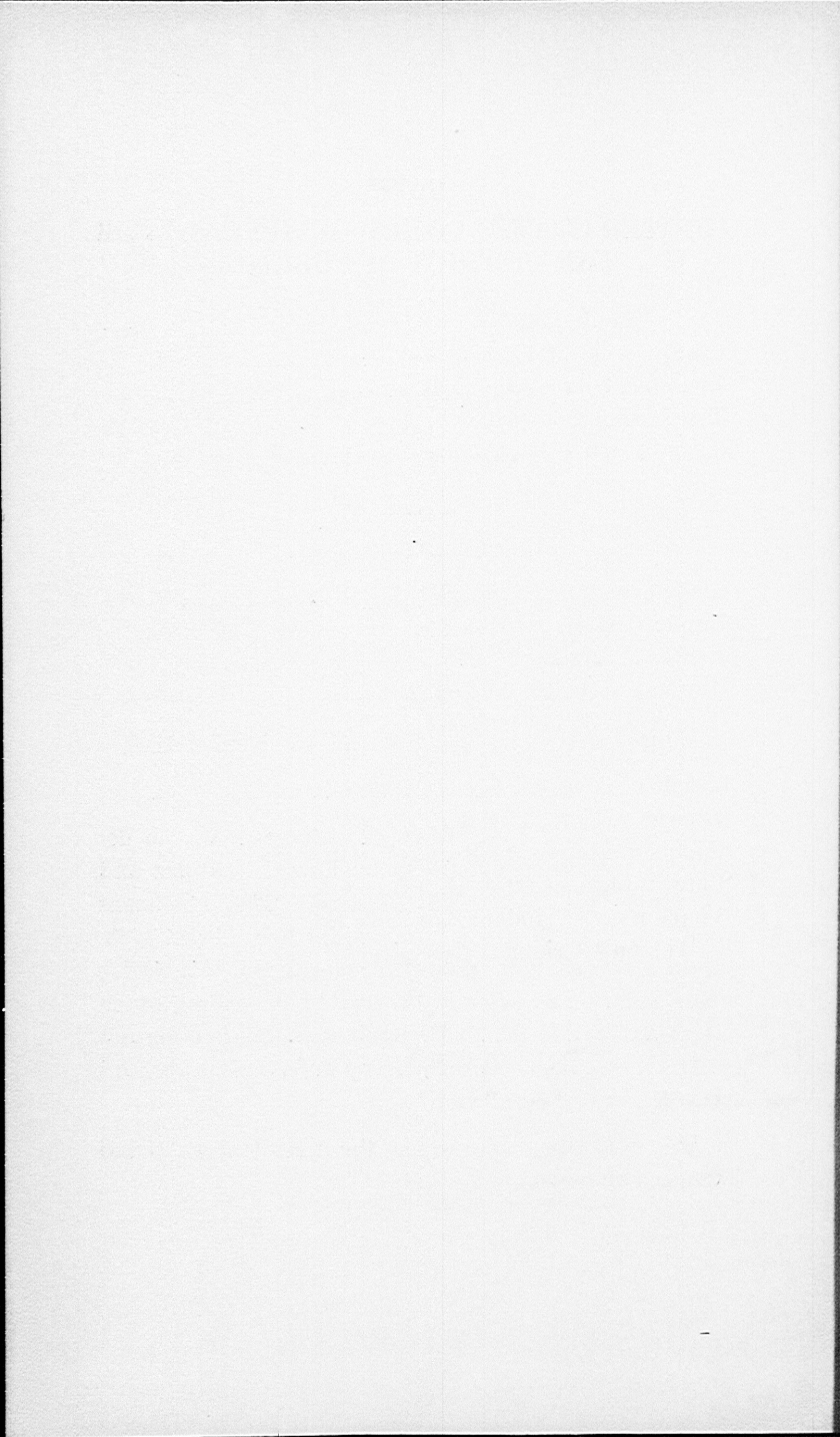
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INDEX.

	Page
History and Statement of the Case	1-3
The Indictment	1-3
Assignments of Error	3-25
Introduction to Argument	25-27
The Law of Conspiracy	28-42
A most remarkable condition of proof exists in this case	33-42

INDEX OF AUTHORITIES.

Bloomer v. The State, 48 Md. 521	30
Duplex Printing Press Co. v. Deering, 254 U. S. 466	31
Hoffman v. U. S., 68 Fed. 101	31
Hyde v. U. S., 27 D. C. 362	21
Kidwell v. U. S., 38 App. D. C. 566	21
Lorenz v. U. S., 24 App. D. C. 387	20
Osborne v. U. S., 17 Fed. (2d) 246	39
Shields v. McKee, 11 Bradwell, (Ill.) 188	29
State v. Jackson, 82 N. C. 565	29
Wharton on "Criminal Law" 9th Ed.	29
Wright on "Criminal Conspiracy"	28



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HISTORY AND STATEMENT OF THE CASE.

The Indictment.

This cause originated by an indictment of the defendant and two co-defendants, Robert S. Stunz and Alexander McNeill, *both deceased*. The indictment was found by the Grand Jury at its April Term 1933. Both co-defendants Robert S. Stunz and Alexander McNeil had died *prior to the trial* of this cause, which trial occurred in the Fall of 1935, resulting in a verdict of guilty against the *only living defendant*, appellant herein.

The indictment upon which the defendant was tried was in two counts,—

THE FIRST COUNT charged a conspiracy against the three defendants to "Commit an offense against the United States of America, to wit: the offense of larceny as condemned by Section 826 of the Code of Laws in and for the District of Columbia * * *", the amount involved being charged as \$50,000.00. The alleged conspiracy is charged to have begun on February 1, 1925, and to have continued to March 3, 1933. Overt acts are charged to have been committed between the two last mentioned dates.

THE SECOND COUNT in the indictment charges a conspiracy between the same three defendants to commit the crime of embezzlement by causing one of the defendants, Robert S. Stunz, as an employee of the Park Savings Bank, to unlawfully convert to their joint use funds of the Park Savings Bank amounting to \$50,000.00, in violation of Section 834 of the Code of Laws of the District of Columbia. *The same overt acts, in identical language*, are charged in support of the second count, as with respect to the first count, although the elements of the two crimes are essentially different.

THE UNCONTRADICTED RECORD in this cause shows that the defendant, Benedict M. McNeil, the only defendant living at the time of the trial and *the only defendant put on trial*, was an employee of the Park Savings Bank until July , 1929, when his services *were finally and entirely dispensed with, and all authority that he had ever had with the bank terminated*, and his right to have anything to do with the affairs of the bank finally ended, and that after his separation

from the bank he was completely disassociated from any authority, official or otherwise, in the bank.

When this case came on for trial the one surviving defendant-appellant herein, was placed on trial upon the two counts in the indictment above-mentioned and proof was proceeded with on the part of the United States and said defendant, with exceptions duly taken to various rulings of the Court as to the admission of testimony and for other causes.

Upon conclusion of the case and submission of the question of guilt or innocence to the jury a verdict of guilty was returned and thereafter a motion for a new trial was filed and overruled, an exception taken thereto, and in due course an appeal taken to this Court.

ASSIGNMENTS OF ERROR.

The assignments of errors relating to exceptions to the rulings of the Court as to the admission and exclusion of evidence, oral and documentary, and rulings upon legal questions arising during the course of the trial are divided into certain classes.

~~ASSIGNMENTS Nos. 1 AND 2 relate to the refusal of the Court to grant defendant a bill of particulars and to abate the proceedings because of the death of the defendants Robert S. Stunz and Alexander McNeil. These assignments are abandoned.~~

ASSIGNMENT No. 3—While the witness George E. Walker, ^{Chairman of the Board} ~~President~~ of the failed bank, was on the stand, defendant's counsel asked him the question: "What

are the duties of a director of a bank?" The Court refused to permit the witness to answer this question. Exception was taken in due course. As to this ruling the Court was clearly in error, and this assignment is insisted upon.

ASSIGNMENT No. 4 relates to the introduction of Government Exhibit D-3 Line 85, Page 4, of the Record. In this instance the Court permitted the paper (Head Teller's daily statement) offered in evidence to be received, although the witness admitted that it was only prepared by him in part. This was clearly in error and is insisted upon. The same point is insisted upon as to ASSIGNMENT No. 5. Here no evidence of preparation by the witness was offered.

Exhibit B-1 offered in evidence is shown by ASSIGNMENT No. 6 and is insisted upon because defendant insists that no evidence was offered, as shown by the record, in any way connecting the transaction up with any previous alleged conspiracy, and therefore the same was irrelevant. The same point is made as to Exhibit B-2, ASSIGNMENT No. 7. If there were any evidence connecting these exhibits up with two or more of the defendants, this assignment would not be insisted upon.

ASSIGNMENT No. 8 is typical of a great number of other similar exhibits known as debit and credit tickets under the designation "Collection Sundries", a long schedule of which items will be found on pages 90 and 91 of the Record, being numbered as Exhibits from A-1 to A-64 inclusive. Further discussion of this will be found in pages following in treatment of similar items under Assignment No. 13.

ASSIGNMENTS Nos. 9, 10 and 11 are combined for the Court's consideration. It is insisted that the record makes no showing in any wise connecting these items with the conspiracy, or showing that they occurred in furtherance of an alleged conspiracy, unless Government counsel can point out wherein they were connected up in some way with the alleged conspiracy—if one ever existed—then they should go out as incompetent evidence.

ASSIGNMENTS Nos. 8, 12, 13, 15, 16, 18, 19, 22 23 and 33 are combined and insisted upon as clear errors in admission in evidence against appellant without any showing of a conspiracy ever having been formed or of the connection of the alleged evidence with such alleged conspiracy.

Chiefly, the evidence covered by these assignments consists of what was designated by the witnesses as "Head Teller's Statements", the same being long typewritten schedules with footings and fraudulent interlineations in the handwriting of the defendant Stunz. A typical page of this kind is found between pages 18 and 19 of the Record, headed "Daily Proof Sheet, Mildred, Ledger Section A," dated January 8, 1932. The witness who produced this exhibit and offered the same in evidence was the witness E. Demarest Simpson, whose testimony began on page 9 and continued to page 55 of the Record, and which witness was relied upon by the Government to elaborate the alleged facts in proof of the Government's contentions as to the criminal responsibility of the defendants. This witness was employed in the bank, as head commercial bookkeeper, when it closed and had been em-

ployed at the bank since 1920 as said Head Commercial Bookkeeper, her period of service covering all of the events in any wise appertaining to the charges against the defendants. Describing Exhibit F-3, one of the typical pieces of evidence offered by the Government, the witness E. Demarest Simpson, said:

“Upon being shown Exhibit for identification F-3, witness stated the same is a proof sheet showing the day's work for January 8, 1932; that the adding machine slip which is glued under that sheet was prepared by her; that the handwriting appearing upon the slip was hers; that the item in witness' handwriting of \$7646.19, marked 'R. S.' means that that is Mr. Stunz' name; that witness got those figures off the teller's settlement book to prove the work that day, that is, January 8, 1932; that the figures that witness read to counsel appear in the proof of checks for that day; that the figures above mentioned mean that to prove the work that day witness had to get those figures off the head-teller's settlement book which Mr. Stunz had put on in his own figures to prove the work and that without that figure witness would be short that amount of money.”

Beyond question, if the figures added to this statement by the deceased defendant Stunz were added as a part of a pre-existing conspiracy and in furtherance thereof and for the purpose of defrauding the bank or deceiving its officials as to a previous fraud there would exist some kind of criminal responsibility against all who participated therein, but the Court's attention is earnestly called to the fact that this document, as all criminal documents offered in evidence by the Government, post-dated by several years all services of the defendant Benedict M. McNeil, as an official of the bank, antedated by several years all the

authority he had as such official or employee of the bank, and the *record in this case fails to show in any way, even by an intimation, so far as counsel has been able to ascertain by a diligent scrutiny of it in its entirety, that the defendant Benedict M. McNeil ever knew of the change in the figures by the defendant Stunz until the trial of this cause, or that he, or his deceased father, and co-defendant, had any transactions with the bank at any time which were effected by the changed figures or that they benefited by such changes directly or indirectly.*

The evidence of the Government was that every change in the terms of these head-teller's statements was made in the handwriting of Mr. Stunz and by him delivered to them for record in the books of the bank; that the same was true as to every allegedly fraudulent item under the heading "Collection Sundries." That during *the service of the defendant Benedict M. McNeil in the bank no such entries were ever made by said McNeil, or with his knowledge, or under his supervision; that the beginning of such entries was after he left the bank, and that every transaction with him or under his orders, prior to his leaving the bank in 1929, were regular, consistent with good banking and proper.*

To have admitted these long technical schedules as evidence against the defendant McNeil and his deceased father, to have permitted the prejudicial influence of the testimony as to the irregular changes in the work of the bank clerks by the defendant Stunz against the appellant herein, and then to have required

no evidence connecting these complicated and technical documents up to some alleged previously existing conspiracy was grossly prejudicial to appellant, and made it utterly impossible for the jury to render a just verdict upon competent evidence.

ASSIGNMENTS OF ERRORS NOS. 14, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 40, 41, 42, 43, 44, 45, 46, 47, AND 52 are combined and insisted upon in chief because of the same argument submitted above under Assignment of Errors No. 8 etc.

These Assignments of Errors in chief relate to deposit tickets and other items of charges or credits against the accounts of A. McNeil & Company, or appellant herein, in the Park Savings Bank, and they are combined in order that appellant may comply as nearly as possible with the rules of this Court that Assignments of Error be reduced for consideration to the smallest number possible. What is stated here as to the general description of these items of evidence may not be entirely accurate, but is substantially so.

To illustrate the character of evidence to be here considered we ask the Court's examination of Exhibit P-1, record page 29, an item of \$30,000.00; Exhibit P-6, record page 29, an item of \$19,650.00; Exhibit P-9, record page 30, an item of \$6,875.25; and Exhibit P-11, record page 30, an item of \$4,000.00; these four items aggregating more than \$60,000.00. Exhibit P-1, record page 29, is an item charged to "Collection Sundries" and shows a deposit to that account of \$30,000.00, and under the heading "Checks as follows" is found the name of "Jenkins" following which is found the item of \$30,-

000.00, the item being dated December 31, 1930, about one and one-half years after the appellant had left the Park Savings Bank as an official and/or employee. These items, according to the testimony of the witness Simpson, were all in her handwriting. This employee, according to the testimony of the President of the Bank, George E. Walker, at all times was under the complete domination of the defendant, Stunz, with scarcely no supervision by the Directors, which defendant had complete control over all the acts of his subordinates. Objection was made to this mass of evidence as having no evidential bearing against appellant and having been in no way connected with him or with any alleged conspiracy in which he had been engaged. Notwithstanding said objection same was received in evidence. The receipt in evidence of this item and other items aggregating hundreds of thousands of dollars, with the same vices, carried with it the implication against appellant that he was a guilty participant with the deceased defendant Stunz and the jury was left to infer from the Court's receipt of this evidence that each item so received was an evidence of fraud and criminal intent to defraud the bank and to hide embezzlement or some other wrongful manipulation of these funds by the defendant Stunz. The record is teeming with items such as that just described, all received in evidence with no serious effort made to show any connection with any preexisting conspiracy, or any relation to the same, or any connection with appellant, or that he received any possible benefit therefrom, or that the same in any wise affected the account of his father, A. McNeil & Co. Quite a number of the items

described are in the handwriting of Miss Simpson, the head commercial bookkeeper of the bank, and represented her work done in the usual course of business, but the same went before the jury as part of the Government's scheme of unfolding to it what was purported to be the wrecking of a fine banking institution by the defendant and the deceased co-defendants, when, according to the Government's evidence and own witnesses, appellant had no knowledge thereof or connection therewith even of the remotest character.

So far as counsel has been able to ascertain from a scrutiny of the record no effort was ever made to show that any of these items were in furtherance of any transaction amounting to a conspiracy or other wrongful conduct in which appellant is alleged ever to have had any participation.

ASSIGNMENT OF ERROR No. 35, record page 98. Counsel who prepares this brief deeply regrets that he is doing so without having first-hand familiarity with the introduction in evidence of the allegedly incriminating document found in the bank by the witness Sauer described on pages 97 and 98 of the record as an "Envelope in the correspondence files of the bank" found by him "which at that time were (was) in the basement; that this was found in the section wherein Mr. McNeil's other correspondence and papers were on file. That this envelope was sealed at the time the witness found it; that he broke the seal shortly after he found the envelope."

The above envelope was offered in evidence as Government's Exhibit R-14, and was endorsed on its face

"B. M. McNeil, Personal," the endorsement being in the handwriting of Robert S. Stunz. In this envelope was found Government Exhibit A-1, a part of which exhibit was made up of a list of items drawn by the Park Savings Bank by the defendant Benedict M. McNeil in Canada, about the time of his departure from the Bank finally; that this item amounted to \$26,030, and was a credit to Sundries Collection. Government witness Sauer offered, as an expert and permitted to testify over objection, that this matter was "an offset in the sundry collections account, and was credited to the sundry collections account, which was a general ledger account in the bank; that this credit to sundry collections was on July 3, 1929 and offset in a like amount on the same day to "savings control"; that both of these items appear in the cash journal as separate items—the \$26,030 credit to sundry collections, marked "sundry" in the journal and represented by an item marked,

"1/24	N. Y.	\$ 7,000.
2/5	Halifax, N. S.	6,500.
	C. F. Childs & Co.	6,700.
	Toronto, Ont.	5,830.
	July 5, 1929	\$26,030.

That said figure was offset on the same day in the cash journal to 'savings'."

Over objection, the said witness Sauer was permitted to testify (Record p. 106) as follows:

"Witness stated that he examined the records of the bank to determine if any charge was actually put through to any savings account for the offsetting debit in the amount of \$26,030, and that he

found no check or charge going to any individual account, the effect of which was to cause the savings control account to become understated in its aggregate on the general books, as compared with the individual savings account balances in the bank, to that extent, and by that one time of \$26,030.”

This witness testified further covering several pages, theorizing, elaborating, drawing conclusions, expressing opinions to the jury and summing it all up, stating to the jury that for none of the items referred to, amounting to \$26,030, had the Park Savings Bank ever received any benefits or money consideration and that the entries were fictitious.

Thereafter upon cross examination this same so-called expert witness Sauer was forced to admit that his testimony just recited and the implications therefrom were so grossly incorrect as to be shocking. In other words, he had to admit that whereas in his direct examination he had testified that “he found no check or charge going to any individual account * * *,” that in fact that only the \$6500 item went to the A. McNeil & Co. account; that the C. F. Childs item did not get into the account; that the \$7,000 item did not go to the credit of the McNeil account, and that the \$6,500 item was part of an original item of \$16,500 reduced to \$6,500 by payments. We quote these corrections by the witness from his own testimony, page 137 of the Record, as follows:

“With respect to the \$26,030 item and with special reference to the \$6,500 item which witness claimed went to the A. McNeil account, witness stated that so far as he could determine not only the \$6,500

item but that all of the *items were the McNeil Company's.* * * *,”

“Upon being questioned the witness stated that the \$6,700 item *did not get into the McNeil account*; that the item ‘C. F. Childs’ *did not get into the McNeil account*; that *there was no credit in the account for either the \$7,000 item or the \$6,700 item of the Childs Co.*; that the \$6,500 item was *originally \$16,500*, that it was that figure a short time before this; that that item varied from time to time. It ran from February 1925 when the A. McNeil & Company was credited with \$4,000; March 2 when it was credited \$1000 * * *.”
(Italics ours.)

Page 113 of the Record:

“The difference between the \$16,500 credit and the \$6,500 charge which was returned to sundry collections appears as an offset and debit to A. McNeil & Co. in the amount of \$10,000.

“Witness stated that the last mentioned item in the amount of \$10,000 indicated that the two items sent out to Canadian Banks were not collected but were charged back to A. McNeil & Co. account in the amount of \$10,000.

“Witness stated that he meant that \$10,000 of the items were charged back to the account as appears in the account, but \$6,500, on February 5, 1929, appears as a charge in the sundry collections account as a further item for collection. Witness stated that this is tracing it right up to the time it was credited out on July 5, 1929, \$6,500, and included in the aggregate of \$26,030, which was charged to ‘savings’ on that day.”

How can the Court for one minute believe that the witness had a fair trial when a so-called expert convicted himself by such grossly incorrect conclusions on one series of items? May it not be inferred with reasonable certainty that his other conclusions, if

probed thoroughly, would have revealed the same grossly erroneous conclusions?

It is not necessary to characterize this witness' statements as deliberately false. It is only necessary to show these contradictory statements and reveal to this Court the grave danger to any defendant's liberty and good name to permit an alleged expert, *with no personal knowledge of the transactions about which he testified, to testify as though he were an active participant in the events he describes.*

Chiefly because of these transactions counsel believes the jury was led to convict the defendant-appellant. While the witness Sauer knew nothing about the transactions of his own knowledge, and gathered all that he knew from the examination of the books of the bank more than six years after the transactions had happened and formed his opinion solely by a system of deduction, nevertheless his evidence was permitted to go to the jury as the positive statements of an alleged expert, although he had never been a bank examiner ^{*before examining this bank*} or expert in bank accounting as a witness. The conclusions of this witness, we submit, were so gravely prejudicial to the defendant as to make their receipt in evidence, by the Court, grossly prejudicial to his rights, and we beg the Court to examine thoroughly this witness' entire testimony, and especially the testimony found from pages 106 to 110 in which this particular item of \$26,030.00 is discussed.

We bring the Court's attention to one other serious phase of this particular piece of evidence. According to all the testimony, the witness Stunz defrauded the

Park Savings Bank of more than \$2,000,000, and then committed suicide in desperation upon threat of exposure and arrest. The endorsement on the back of the envelope was in the handwriting of the defendant Stunz. May not it be fairly inferred that this endorsement was made in a last desperate effort to escape some of the consequences of his wrongdoing? True, the four items aggregating \$26,030.00, as shown by Government Exhibit A-1, were charged to "Sundry collections" by the defendant Benedict M. McNeil, in his handwriting, but his evidence was uncontradicted that these entries were made by him, by direction of the defendant Stunz, and further that the transactions were in all respect the usual banking transactions, without wrongdoing or fraud on his part, or on the part of anyone else, and that the bank received full value for each item and held security or other consideration therefor.

✓ ASSIGNMENT No. 36. The items of evidence listed under Assignment No. 36 consisted of a long series of checks of A. McNeil & Company. We submit that in no way were these items connected up with any alleged conspiracy and were therefore improperly and erroneously received in evidence, and that their implications were damaging to the defendant and imputed to him a guilty participation in the alleged conspiracy.

ASSIGNMENT No. 39 has been treated in the discussion of Assignment No. 35.

ASSIGNMENTS Nos. 48, 49 AND 50. In the examination of the alleged expert witness Sauer innumerable questions were asked him where the answers tended

to involve the defendant in criminal misconduct. Upon cross examination the witness was asked, with a view to exculpating the defendant, the following question (R. p. 44):

“Did it not also appear that there was a note in the nature of a blanket note that was to take care of any amount in excess of the sum he had on deposit?”

Strange to say, the Court refused this question to be asked and answered, although the witness was on cross examination.

It might be fairly inferred that the witness would have answered the question in the affirmative. If so, the whole scheme and plan of the Government to show that A. McNeil & Company used various credits of funds withdrawn from the bank, without a corresponding deposit of collateral or notes therefor might have collapsed, and yet the Court after having allowed all of the bank opinion evidence against the appellant and having received all of the damaging implications drawn by said witness against appellant, refused to permit him to in any way answer the question which might have clarified his previous testimony.

Surely no citation of authority is necessary to show that this was a prejudicial error.

The same criticism, to a modified extent, may be made as to the Court's refusal to allow said witness Sauer to answer the questions recited in Assignment of Errors Nos. 49 and 50.

ASSIGNMENT OF ERROR No. 51. To show the highly prejudicial attitude of the Court toward this defendant

in the trial, we ask the Court's further consideration of what we have said under the heading "Assignment No. 48" and our observation now under Assignment No. 51. After having been cross examined, as shown by Assignments Nos. 48, 49 and 50, and the questions therein recited having been refused by the Court, counsel for the Government on re-direct examination permitted the following question to be asked and answered:

"In the course of your examination of the records and books of the Park Savings Bank, particularly with reference to the A. McNeil & Co. account, when you found one of those credits which you have described as fictitious was put to the account to credit an overdraft and which left a balance over, when that balance was drawn out, whose funds were drawn out at that time?"

No more prejudicial question could have been asked and answered than the one just quoted, as it carried with it the conclusions of the witness Sauer that the entries inquired about were fictitious; that the overdrafts were wilfully made and that the balance was drawn out without a corresponding deposit of collateral or promissory notes, and that the funds drawn out were the funds of the bank drawn without a corresponding consideration deposited. *No wonder the defendant was convicted after this question was asked and answered!*

ASSIGNMENTS NOS. 53 AND 59. These assignments relate to the refusal of the Court to direct a verdict of not guilty as to the counts in the indictment at the close of the Government's case, and at the close of all the testimony. We again urge on this Court that such verdict should have been directed in each or both instances.

ASSIGNMENT No. 54. This assignment relates to the Government's refusal to require an election by the defendant as to which count that would go to the jury upon whether the count was the first count charging a conspiracy against the three defendants to commit the offense of larceny from the Park Savings Bank, or the second count charging a conspiracy between the three defendants to commit the crime of embezzlement by causing the defendant Stunz to unlawfully convert \$50,000.00 of the banks' fund.

The elements of the crimes of larceny and embezzlement are so contradictory and different, involving conduct so opposed one to the other, involve personalities with different capacities, and as to embezzlement involves at least the requirement that one of the defendants shall be a fiduciary, that to permit both counts to go to the jury, upon the same evidence, was highly prejudicial to the defendant-appellant and erroneous as a matter of law.

It will be contended by the Government in their argument herein that there was evidence in this case tending to establish both offenses. We challenge a showing of this evidence. As we read the Record, the evidence was a running story tending to establish one ultimate crime, if any, and therefore to go to the jury upon two counts with the same evidence,—the crimes being of different quality and composed of different criminal elements,—constituted an error by the Trial Court.

ASSIGNMENT No. 55 is abandoned.

ASSIGNMENT No. 56. This assignment of error consists of the Court's refusal to allow defendant's witness John Moran, Receiver of the Park Savings Bank, to answer the following question:

"And was not the \$10,000 note shown by the records and by this correspondence of the attorney for the bank, as given to the bank in payment of obligations of Alexander McNeil?"

It may be reasonably inferred from this question that the answer would have been that the correspondence of the Park Savings Bank with the defendant Benedict M. McNeil would have shown that instead of the \$10,000 item, referred to by the witness Sauer as fictitious, was a *bona fide* item of \$10,000 represented by obligations of the deceased defendant Alexander McNeil, but the Court refused to permit an answer to this question by the official Receiver of the Bank. Certainly, this was grossly prejudicial to appellant and his co-defendant Alexander McNeil, and denied him the privilege and right of bringing out a defense to the opinion evidence of the alleged expert Sauer; that this and numerous other items of credit to his father's account, A. McNeil & Company, were fictitious.

ASSIGNMENT No. 57. This assignment relates to the refusal of the Court to allow the defendant appellant to answer the following question:

"Mr. McNeil, if Mr. Stunz put in a deposit ticket, let us say of \$350.00 or \$500.00, to the credit of A. McNeil & Co. and there was a note given to the bank at that time, if the account were credited with, let us say the sum of \$350.00, and if the note were posted to the records of the bank, would that be a proper offset to that item?"

Upon what theory could the Court have reasonably refused to allow the defendant, fighting for his liberty, to explain to a jury of his peers a deposit ticket of \$350 or \$500 credited to the account of his father, as having been based upon a note given to the bank at the time, or assuming that the question was asking for the method used in crediting such items what prejudice to the rights of the government could have been done by permitting the answer? Failure to permit the answer was clearly an error by the Court.

ASSIGNMENT No. 58. What has been said under Assignment 57 applies to this assignment.

ASSIGNMENT No. 59 has been discussed under Assignments Nos. 53 and 59.

ASSIGNMENTS Nos. 60 AND 61. An examination of the record will convince the Court, we believe, that there was introduced in this record no evidence establishing a continuing conspiracy. Therefore, the Statute of Limitations bars the prosecution of this indictment, all of the overt acts charged having occurred more than three years from the date of the alleged conspiracy fixed as February 1, 1925. The dates of said overt acts ranging from October 8, 1930, to and inclusive of March 3rd, 1933.

This Court has held in the case of *Lorenz vs. U. S.*, 24 App. D. C. 387 that a conspiracy is a continuing offense by the repetition of overt acts which come within the three year period. The Court has also held that when a conspiracy is formed that the offense is then complete and that the statute immediately begins to

run and becomes a bar unless subsequent overt acts are committed within the three year period prior to the indictment and said overt acts must be committed in furtherance of the original unlawful conspiracy.

ASSIGNMENTS NOS. 62 AND 63. The Court erred in refusing to require the Government to elect which count of the indictment, whether count one or count two, the cause would be submitted to the jury upon. These counts were repugnant, charging conspiracies to commit crimes of different characteristics and elements, the one a conspiracy to cause an employee of an institution to embezzle its funds, the other a conspiracy between the three defendants to commit larceny of its funds. Permitting both charges to go to the jury on the same evidence was prejudicial to the defendant and reversible error.

This Court has held in *Kidwell vs. U. S.*, 38 App. D. C. 566 that indictments charging different crimes may not be consolidated for trial, and also that counts in the same indictment charging different crimes will not be permitted. A careful reading of this authority, we believe, will convince the Court that its previous holding should be made to apply to this case, in which event it would necessarily follow that the Trial Court's refusal to require an election by the United States was reversible error. We also refer to the case of *Hyde v. U. S.* 27 U. S. 362.

ASSIGNMENT No. 64. Exceptions to the granting of Prayers Nos. 1, 2 and 5 are abandoned, but the exception as to the granting of Prayers Nos. 3 and 4 are insisted upon.

It is believed that the prayers of the Government granted by the Court were grossly prejudicial to the defendant. Of course, the defendant could only have been proved guilty by showing that he committed a wilful violation of law by a preconcert with one or more of his co-defendants. Notwithstanding this, the Court's attention is called to the Government's Prayer #3 found on page 825 of the transcribed record, which prayer was granted by the Court as offered by the government, to wit:

"The jury are instructed that under the District of Columbia Code *one who feloniously* takes and carries away anything of value, without the consent of the owner and with the intent to deprive the owner permanently of the use thereof, is guilty of larceny. The jury are further instructed that *if a customer* of a bank who wilfully and knowingly *overdraws his account* in the bank, with intent to defraud the bank of the proceeds of the overdraft, and *who* as a result and with such fraudulent intent *receives* the proceeds and converts them to his own use, is *guilty of larceny from the bank.*" (Underscoring ours.)

It will be noted immediately on reading the above prayer that the jurors were practically instructed to find the defendant guilty if, from the evidence, they believed that *he alone* had committed any act which amounted to the substantive crime of larceny.

Likewise Government's prayer #4 instructed the jury, in effect, to convict the defendant of the substantive crime of embezzlement if the jury believed that *he alone* had committed any act which amounted to embezzlement. Government's Prayer #4, granted by the Court, reads as follows:

“The jury are instructed that the District of Columbia Code provides *that if any officer, attorney, agent, clerk or servant of any corporation shall wrongfully convert to his own use anything of value which shall come into his possession or under his care by virtue of his employment or office, he shall be deemed guilty of embezzlement.* The jury are further instructed that under this statute a conversion of property *to one's own use is accomplished* when one with fraudulent intent and without the authority of the owner exercises domination over the property, and permanently deprives the owner of the enjoyment of the property; and it is wholly immaterial whether the person so converting does so for his own personal advantage or not.”

It will be noted that the effect of the Government's Prayer #4 was to direct the jury to look upon the charges against the defendant as personal and individual, and not as connected with or related to his co-defendants and not dependent upon their guilty cooperation or confederation therein.

ASSIGNMENT No. 65, record p. 192. The Court erred in charging that every act done in furtherance of the conspiracy caused the conspiracy to be a continuing one. This conclusion of law by the Court could only be true provided the act in question was done and committed within the statutory period, that is, within three years from February 1st, 1925. The Court's charge did not make this clear, was confusing, and therefore prejudicial to the rights of the defendant and an error.

ASSIGNMENT No. 66, record p. 194. The Court committed error in its charge to the jury, as indicated by this Assignment of Error.

ASSIGNMENT No. 67 is abandoned.

ASSIGNMENT No. 68, record p. 194. The Court clearly committed error in refusing defendant's Prayer No. 5, which was in the following language:

"You are further instructed, as a matter of law, that the conspiracy or agreement must be established beyond a reasonable doubt and was existing between the parties charged in the indictment at the time of the commission of the alleged overt acts and each overt act must be clearly referable to a preagreement between the parties. In short, there must be proof beyond a reasonable doubt of the unlawful agreement, a participation therein by the defendant, Benedict M. McNeil, with a full knowledge of the unlawful agreement."

Prayer No. 9 of the defendant was in the following terms:

"The Court instructs the jury, as a matter of law, that you should look upon the defendant as an innocent man, and if the jury can harmonize all the testimony in this case with a reasonable hypothesis of his innocence then their verdict should be not guilty. In other words, if the jury can harmonize all the testimony in this case with the possibility of his innocence their verdict should be not guilty. A hypothesis means that if you can see where he was possibly innocent and reasonably so, a reasonable hypothesis, then your verdict should be not guilty."

It seems to counsel for the defendant-appellant that this prayer correctly states the principles defined by the law for the full protection of one charged with crime. It is another way to state the doctrine of reasonable doubt. Refusing this prayer constituted error.

Prayer No. 10 is in the following words:

"The Court instructs the jury, as a matter of law, that you should look upon the defendant as

innocent. If the jury can harmonize all the testimony in this case with a reasonable hypothesis of his innocence then your verdict should be not guilty."

It seems to counsel for appellant that Prayer No. 10 above quoted states the true doctrine of a presumption of innocence, as well as that of reasonable doubt, and also the doctrine that if a hypothesis of innocence may be as reasonably assumed from the evidence as one of guilt that the hypothesis of innocence must be indulged. Therefore the prayer should have been granted and its rejection was prejudicial and erroneous.

INTRODUCTION TO ARGUMENT.

1. Counsel writing this brief did not try the case and has been required to prepare this brief from a record very complicated and technical in character, in many respects grossly indefinite as to implications, and with a significance, if any, beyond the ordinary reader's intelligent comprehension.

2. The Court will understand the embarrassment of counsel in having to prepare a brief from a long typewritten record, made necessary by the poverty of the appellant, and allowed, by the generous action of this Court, in lieu of printing. Counsel also fully appreciates the fact that to examine this record in detail and with a full comprehension of its contents will be a great labor upon this Court, a labor deeply regretted by counsel, but one made imperatively necessary by the impoverishment of appellant and his deep-

ly earnest desire to have his rights finally passed upon by a Court of appellate jurisdiction.

3. This cause is brought to this Court by counsel for appellant now appearing herein because of a very deep-seated conviction that the verdict against appellant was not warranted by his actions and not justified by the evidence against him, and that the charge of the Court was prejudicial to his rights. An earnest appeal is made to this Court to give as thorough consideration to the complicated record submitted as possible, since the liberty of a man is involved, the reputation of another deceased man is involved, and involved because they did business with another person, now deceased, as the commanding official of a large bank in this jurisdiction, who admittedly was a criminal of the grossest type and an embezzler to the extent of many hundreds of thousands of dollars, and who committed suicide upon the discovery of his crimes, after their concealment for nearly ten years from the officers of the bank, its board of directors, and a score or more of bank examiners, who at stated times, examined the assets and records of his bank.

4. According to the undisputed evidence in this case, a bank, organized many years ago, was found to be deficient of assets to the extent of more than two millions of dollars in March, 1933, and the voluminous record in this cause shows that these assets were recklessly loaned to worthless, fictitious and chimerical persons and corporations by Robert S. Stunz, a deceased cashier and subsequently its vice-president and cashier, and at the time of the closing of the bank its Vice-President,—all being lost because of his unrestricted

and unrestrained authority over the bank and all of its assets.

5. Notwithstanding the deficiency of more than two millions of dollars caused by the transactions of said deceased cashier, ^{and} vice-president ~~and president~~, at the closing of the bank in March, 1933, the astounding fact is disclosed from the record in this case that the only person indicted and brought to trial on any charge was the defendant-appellant herein Benedict M. McNeil, for an alleged conversion to his use, through the misconduct of the defendant Stunz, of items aggregating approximately \$26,000.00, the same being the accumulation of loans made to the said defendant Alexander McNeil, beginning in 1925, during the days of his and the country's prosperity, and culminating in 1933, when the bank was closed, said loans being at all times secured by valuable real estate mortgages and otherwise, and the said Alexander McNeil, the borrower being dead at the time of the trial of the charges, leaving his son, the appellant herein, without the benefit of his testimony with respect to said transactions.

6. Counsel will do his utmost to make the presentation of the grounds of appeal logical and clear. *In order that the Court may appreciate fully the errors of the Court, leading to appellant's conviction, and the ruin for his life-time of his name and reputation, as well as that of his deceased father, it will be necessary for the Court to give hours of its valuable time to a reading and analysis of the typewritten and photostated record before it.* But if belated justice may be done thereby, surely the result will warrant this labor that right may finally prevail!

THE LAW OF CONSPIRACY.

Counsel asks the indulgence of the Court in presenting somewhat out of normal order a statement of the law of conspiracy in order that the fundamental principles governing this appeal may be in the mind of the Appellate Justices when they are reading the evidence and argument, based thereon and applying the same to the law or applying the law to the statements of fact. According to our investigation, the outstanding text authority on the subject of Conspiracy is the volume by Mr. Wright on "Criminal Conspiracies and Agreements" (1896) p. 212, Subject "Evidence". Of course, there are many other text authorities which define "Conspiracy" but the volume by Mr. Wright seems to elaborate and make clearer than any other what must be developed in order that anyone may be guilty of a conspiracy. From the above volume we take the following quotation (p. 212):

"In nearly all cases a conspiracy must be proved by circumstantial evidence, that is, by the proof of facts from which it may be fairly implied that the defendants had a common object, and that the acts of each, though they may be different in character, were all done in *pursuance of a common end and calculated to effect the common purpose*. It must be made to appear that the parties steadily pursued the same object, whether acting separately or together, by common or different means, all leading to the same unlawful result. Concurrence of action on a material point is sufficient to enable the jury to presume concurrence of sentiment, and from this the actual fact of conspiracy may be inferred." (Italics ours.)

Further on page 213 this author says:

“Care must be taken, however, to limit the evidence to acts and declarations done and made while the conspiracy was pending, and in furtherance of the design; they must be concomitant with the principal act, and so connected with it as to constitute a part of the *res gestae*. Detached acts, or stray statements, or loose admissions made by one, either before the conspiracy was formed, or after it had been consummated, would not be admissible, unless, in some conclusive way, brought home to two or more of the defendants. It is the principle of agency, which, when once established, binds the conspirators together, and makes them mutually responsible for the acts and declarations of each.”

The author further on page 214 says:

“The results (of acts must be) not merely of individual, but the products of concerted and associated action, which, if considered separately, might seem to proceed exclusively from the immediate agents to them * * *”.

The acts of the defendants *must be cooperative by persons closely associated with each other*. (P. 214, citing Wharton Criminal Law, 9th Ed., Sec. 1398.)

Further on page 215 we find the following:

“Regularly, some foundation must be laid by proof, sufficient, in the opinion of the Court, to establish *prima facie* the fact of conspiracy, or proper to be laid before the jury as tending to establish such fact.”

Citing State vs. Jackson, 82 N. C. 565, and other cases.

In Note No. 1 we find cited also the case of Shields vs. McKee, 11 Bradwell, (Ill.) 188, in which the Court of Illinois is quoted as follows:

“A conspiracy cannot be shown by showing acts of the conspirators done separately, but it must be shown as an independent fact, before the acts of one conspirator are admissible against the others for any purpose.”

With reference to the method of proof necessary to establish conspiracy we find on page 215 the following:

“In such cases, the general nature of the whole evidence intended to be adduced should be opened to the Court; and if upon such opening it should appear manifest that no particular proof sufficient to affect the individual defendants is intended to be adduced, it would become the duty of the judge to stop the case in *limine*, and *not to allow the general evidence to be received*, so as prevent the exciting of an *unreasonable prejudice* and a waste of time.”

It is true, as cited by Wright, p. 215, that the order of proof may permit the proof of circumstances upon which the State expects to rely to prove the actual conspiracy, in advance of proof of the conspiracy, but this should be allowed by the Court in its discretion “under peculiar and urgent circumstances * * * upon the undertaking of the State to produce it (proof of conspiracy) afterwards.” Citing *Bloomer vs. The State*, 48 Md., 521.

Modern authorities are consistent with the above statement of principles laid down by Wright as of universal application. We have examined many recent decisions and find no substantial variance from the above basic principles. In a recent case from the Tenth

Circuit, *Hoffman vs. U. S.*, 68 Fed. 101, we quote the following:

“To constitute a conspiracy *there must be unity of design and purpose*. It is bottomed on an agreement to accomplish an illegal act. *Marcante v. U. S.*, (C. C. A. 10) 49 F. (2d) 156. However no formal agreement between the parties to do the act charged is necessary. It is sufficient that the minds of the parties *met understandingly* so as to bring about an *intelligent and deliberate agreement to do the act and commit the offense charged*, although such an agreement is not manifested by any formal words. *Telman v. U. S.* (C. C. A. 10) 67 F. (2d) 716, decided Nov. 29, 1933; *Lawlor v. Loewe*, (C. C. A. 2) 209 F. 721, 725; *Id.*, 235 U. S. 522, 35 S. Ct. 170, 59 L. Ed., 341.” (Italics ours.)

We quote also from the Supreme Court of the United States, 254 U. S. 466, *Duplex Printing Press Co. v. Deering*, 65 Law Ed. 356, as follows:

“The accepted definition of a conspiracy is, a combination of two or more persons by concerted action to accomplish a *criminal or unlawful* purpose, or to accomplish some purpose not in itself *criminal or unlawful* by *criminal or unlawful* means. *Pettibone v. U. S.*, 148 U. S. 197, 203, 37 L. Ed. 419, 422, 13 Sup. Ct. Rep. 542. If the purpose be unlawful it may not be carried out even by means that otherwise would be legal; and although the purpose be lawful, it may not be carried out by criminal or unlawful means.” (Italics ours.)

It was the duty of the Trial Judge in this case to give to the jury for its guidance a charge fully and clearly explaining to it the legal meaning of the basic word “Conspiracy” in the indictment of the defendant-appellant. This was true because the defendant was either guilty of a conspiracy or he was guilty of

nothing. An examination of the indictment shows that he was charged with nothing else. No substantive offense was charged and yet the whole charge of the Court, found in the Record from pages 186 to 195 inclusive, fails to give a satisfactory or correct definition of a "conspiracy" of which the defendant was charged to be guilty in the two counts of the indictment.

The charge of the Court as to conspiracy was in the following language:

Government's Prayer No. 1, p. 186 of the Record:

"The jury are instructed that a conspiracy within the meaning of this statute is a combination or agreement of two or more persons by concerted action to accomplish an unlawful object or a lawful object by unlawful means."

It will appear obvious to this Court that the above definition by the Court left much to be said.

The above quotation, in substance, does give the fundamentals of the definition of "Conspiracy" but it leaves all the refinements of the law to the imagination and gives no explanations or elaborations which would have clarified the meaning of the strictly legal terms used by the Court. The charge, therefore, was inadequate, unexplanatory, legalistic and lacking in that fullness and clearness of statement which a criminal charge should always have.

The Court did not remind the jury that the common purpose required to create an illegal conspiracy must have been of a calculated, deliberate design, and that the parties must have steadily pursued the same object, all leading to the same unlawful results. Nor did

the Court require the jury to consider only evidence showing acts and declarations done and made while the conspiracy was pending and in furtherance of the design, nor that they should be concomitant with the principal act, and so connected to be a part of the *res gestae*. Nor did the Court say to the jury that the detached acts, or stray statements, or loose admissions made by one, either before the conspiracy was formed, or after it had been consummated, would not be admissible, unless in some conclusive way brought home to two or more of the defendants. Nor did the Court explain to the jury that each conspirator was bound by the acts of his co-conspirator only through the law of agency, the original conspiracy so tying the principals together as to make each the agent of all; nor did the Court explain to the jury that the acts complained of must be concerted and associated action, which, if considered separately, might seem to proceed exclusively from the immediate agents to them.

Having outlined from the authorities what is required to make proof of the conspiracy, we come to consider what, if any, evidence was produced by the Government to establish a conspiracy at any time covered by the indictment.

A most remarkable condition of proof exists in this case.

Quite a number of witnesses who were employed with the defendant Benedict M. McNeil for years prior to his leaving the Bank were called by the Government to testify. The purpose of calling these witnesses appar-

ently was to show something adverse to the defendant; to show that he had been a party to a corrupt agreement to wreck the bank and to profit thereby. Instead of making a showing of this kind, however, the Government showed by each of its witnesses who were in charge of the work of the bank daily when the alleged fraudulent and corrupt transactions occurred that the actions of the defendant were innocent, regular and free from wrongdoing.

A brief resume of the evidence of the Government witnesses on the point of the innocence of the defendant will be found in the Record as follows:

George E. Walker, the ^{Chairman of the Board} ~~President~~ of the bank, testified that the deceased defendant Stunz,

“Was one of our vice presidents but he was always at the bank; that in other words Stunz managed the whole institution; that from February 1, 1925, up until March 3, 1933, Mr. Stunz actively managed the bank throughout that whole period; there was reposed in him authority to direct the workings of the bank, and he was actively on hand throughout that whole period; that during the period from the first of February, 1925, until the thirteenth of August, 1929, the defendant McNeil, was assistant cashier at the bank; the Board of Directors accepted Mr. McNeil's resignation as assistant cashier on August 13, 1929; that subsequent to that date Mr. McNeil had no official connection with the bank. I know that Mr. Stunz died on or about the fourteenth of March, 1933.” Record p. 2, lines 28 to 30 inclusive, Record p. 3, lines 27 to 35 inclusive.

Referring to Mr. McNeill's official conduct while an employee of the bank, the ^{Chairman of the Board} ~~President~~ of the bank on cross-examination said:

“As a director of the bank from time to time we had our director’s examinations of the books of the bank. This occurs twice a year. All during the period of time that Mr. McNeil was employed in the bank, we found no irregularities insofar as he was concerned. We found the books in balance for every transaction in which he had anything to do. We found nothing irregular so far as his transactions with the bank were concerned.” Record page 3, lines 51 to 55 inclusive, Record page 4, lines 56 and 57.

On the same page, lines 62 to 64 inclusive, the President of the Bank, referring to the authority of Mr. Stunz over Mr. McNeil, said:

“What Mr. Stunz said in the absence of the directors went, as far as the bank was concerned, in a great many matters, and especially as to all employees. What Mr. Stunz would tell an employee to do, he would do.”

The witness Emily Harrison, employed by the Park Savings Bank for a period of 12 years prior to and at the time it closed, having served as a commercial bookkeeper for two years, waited on the New Accounts window, commercial accounts, safe deposit boxes and the Savings Account windows, and having in the course of her duties posted the Savings Account credits, and having engaged on practically every phase of the bank’s work for that entire period of time not only while the defendant Benedict M. McNeil was employed there, but subsequently to his employment, and until the bank closed in 1933, said:

“That insofar as Exhibits C-3 and B-4 were concerned Mr. Benedict McNeil had nothing to do with them; that he was not present with Mr. Stunz when he read them nor did he give witness any instructions concerning them. That witness worked

in the commercial accounts for about two years when she first went to work at the bank; that she then worked in the savings accounts and the commercial accounts both at the same time; that she recalls that A. McNeil & Company had a savings account at the bank; that at one time it was a large account; witness cannot remember what the size of it was in 1929; that at one time it was as large as \$10,000.00.

“Witness stated that she would do everything that Mr. Stunz told her to do; that Mr. Stunz was the man in charge; that witness would be present when the bank examiners would come to the bank to see the records; that the bank examiners would not see all of the records of the bank because witness would remove same at the direction of Mr. Stunz; that this was done after Mr. McNeil left the bank; that on the last examination made by the bank examiners, in 1933, there were three boxes of regular depositor's savings cards that were removed; that those boxes which were removed would be as large as a drawer; that Mr. McNeil was not at the bank then; that while he was at the bank he never took out any of those cards; that this was all done by Mr. Stunz after Mr. McNeil left. Witness stated that if she remembers correctly that in 1925 and 1926 Mr. Ben McNeil was the assistant cashier; that so far as witness knows from 1925 up until the time Mr. McNeil left the bank in 1929 that Mr. McNeil absolutely did not do any act or thing insofar as the bank was concerned which was irregular or improper or otherwise wrong.” Record page 61, lines 1310 to 1325 inclusive, Record page 62, lines 1 to 9 inclusive.

Exhibits C-3 and B-4 related to charges against the accounts of A. G. Williams in very large amounts, and Robert P. Smith in very large amounts, as shown on Record page 60.

Nellie Moore Stees, a witness for the government, who served the bank first as a bookkeeper, and after that as a clerk in the Note Department, where she remained until the bank closed, stated, with reference to the security deposited by A. McNeil & Company for the monies advanced to that corporation and/or to Alexander McNeil or the defendant Benedict M. McNeil, as follows:

“That there were notes signed by Mr. Alexander McNeil in the note teller’s cage, which witness had occasion to examine from time to time; that she does not remember approximately how many notes of his were in the cage; the bank had a demand loan, and there were also some real-estate notes; that the real estate notes are at the bank now.” Record page 62, lines 18 to 23 inclusive.

The witness E. Demarest Simpson, with respect to the fraudulent changes in the various settlement sheets of the head-teller, also placed entire responsibility on the deceased defendant Stunz individually, with no intimation of guilt therefor against the surviving defendant-appellant herein, her testimony on that point being found in lines 1099 to 1113, page 53 of the record, as follows:

“Witness stated that when she would get these figures off the head teller’s settlement sheet that same would be written in Mr. Stunz’ handwriting—that she never asked him about it; that most of the discrepancies referred to were in 1932 and 1933—the majority in 1932.

“Witness stated that she would be present when the bank examiners came every six months to examine the books and that witness would give them her books and that she would likewise be present

when the directors made their examinations every six months and she would likewise give the directors her books—that so far as she knows the government bank examiners examined all the records of the bank. Witness stated that she found out later that there came a time in 1932 or the latter part of 1931 when Mr. Stunz commenced secreting the records of the bank from the bank examiners; that Mr. Stunz never took any of witness' records away from her at all; witness had nothing to do with savings accounts.”

Incompetent and inadmissible evidence appellant believes caused his conviction. Many expressions from the lips of Government witnesses declaring appellant innocent of all criminal conduct and wrong doing, while an officer of the bank or thereafter, have been quoted above under the heading “A remarkable condition of proof exists in this case”.

Another method of convicting the defendant-appellant, which we think will impress the Court as remarkable and distinctly erroneous will be found in the permission given by the Court to the witness Sauer to examine the books of the failed bank and from said books, with which he was unfamiliar entirely, until after the bank's failure, and with which he had had no connection in a clerical or official capacity, to draw conclusions therefrom altogether unfavorable to the appellant, which conclusions were based solely upon the opinion of the witness as to the probative meaning of the books and his calculations and deductions therefrom. We submit that but for the conclusions of this witness, which were received as direct and positive evidence of the most damning character that the jury

would have, in all probability, returned a verdict of not guilty. Certainly, it is obvious from reading the testimony of this witness that it was utterly unsupported by any personal information possessed by him; that it was distinctly hostile; that the conclusions were often entirely illogical, and that some of the witness' statements when made at first were later categorically changed. Such evidence was inadmissible, by the weight of authority, although the Courts have in recent years greatly extended the admissibility of expert evidence from trained persons other than scientific men, such as Doctors and Dentists. This broadening of the rule as to expert evidence, however, we submit, does not allow of the expressions of opinion based upon book calculations, but only permits the contents of the books to be presented. The ultimate conclusion from such calculations must be drawn by the jury, because such conclusion may determine either guilt or innocence, which is the ultimate prerogative of the jury.

In the argument before this Court on the question of bail for appellant, the Assistant District Attorney, having charge of that matter, in order to justify the evidence of the witness Sauer as an auditing expert cited in a memorandum filed with this Court the case of *Osborne vs. U. S.*, 17 Fed. (2d) 246. We agree with counsel that that case states, with reasonable accuracy, the prevailing opinions of the courts on the question, and we submit that that opinion excludes such testimony as that of the witness Sauer. We submit from the opinion as follows (page 248):

“ ‘In order to lay the foundation for the admission of such evidence it must be shown that the

books of account kept in regular course of the business, that the business is of a character in which it is proper or customary to keep such books, that the entries were either original entries or the first permanent entries of the transactions, that they were made at the time, or within reasonable proximity to the time, of the respective transactions, and that the persons making them had personal knowledge of the transactions, or obtained such knowledge from a report regularly made to him by some other person employed in the business whose duty it was to make the same in the regular course of business.' *Chan Kiu Sing v. Gordon*, 171 Cal. 28, 151 P. 657.

"In discussing the same question in *Chafee & Co. v. United States*, 18 Wall, 516, 21 L. Ed. 908, the court said:

" 'And that rule with some exceptions not including the present case, requires, for the admissibility of the entries, not merely that they shall be contemporaneous with the facts to which they relate, but shall be made by parties having personal knowledge of the facts, and be corroborated by their testimony, if living and accessible, or by proof of their handwriting, if dead or insane, or beyond the reach of the process or commission of the court. The testimony of living witnesses personally cognizant of the facts of which they speak, given under the sanction of an oath in open court, where they may be subjected to cross examination, affords the greatest security for truth. Their declarations, verbal or written, must, however, sometimes be admitted when they themselves cannot be called, in order to prevent a failure of justice. The admissibility of the declarations is in such cases limited by the necessity upon which it is founded.' "

"Measured by this rule it is quite apparent that a proper foundation was not laid for the admission of all the books and records received in evi-

dence; and, unless shown to have been accurately kept, the books of a corporation are not ordinarily admissible against its officers and stockholders, in the absence of evidence tending to show that they had something to do with the keeping of the books, had knowledge of their contents, or such connection with the books as to justify an inference of actual acquaintance therewith. *Worden vs. United States*, (C. C. A.) 204 F. 1; *Cullen vs. United States*, (C. C. A.) 2 Fed. (2d) 524."

We have quoted at length from this opinion because the proposition laid down is very important, if not vital, and the ruling of the Court in the admission of this testimony, as we see it, was clearly prejudicial and erroneous.

Counsel frankly states to the Court that this brief lacks much of the particularity which he earnestly desired to give it. His excuse for this is that he did not try the case and was compelled to examine a great mass of documentary evidence and 900 pages of testimony under the stress of a busy practice and for a client unable to pay for his services. The deficiencies of the brief it is hoped will be overlooked by the Court.

To make up the deficiency of counsel's efforts given to this case as a "labor for justice", and because of old friendship for one of the deceased defendants, it is hoped that the Court will, as counsel has done, and moved by the same motives of a desire to see ultimate justice done, read the record with as much care as the time of the Court will allow in order that the truth may be found from this great volume of testimony,—much of it confusing, irrelevant, incompetent and immaterial,

—and the errors of the Trial Court discovered, and that action reversed and the cause remanded for a new trial.

Respectfully submitted,

R. H. McNEILL,
Attorney for Appellant.

FILED MAY 28 1936

No. 6610

Monahan

CLERK

In the United States Court of Appeals
for the District of Columbia

APRIL TERM, 1936

BENEDICT M. McNEIL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE SUPREME COURT OF THE DISTRICT
OF COLUMBIA

BRIEF FOR UNITED STATES

LESLIE C. GARNETT,

United States Attorney,

JOHN J. WILSON,

Assistant United States Attorney,

Attorneys for Appellee.

TABLE OF CONTENTS

SUBJECT INDEX

	Page
Statement of the case-----	1
Errors claimed by appellant-----	3
Discussion of the evidence-----	4
Argument-----	31
Appellant's contention No. 1—That certain documents known as head teller's daily settlement sheets were not properly proven-----	31
Appellant's contention No. 2—That the accounting data and exhibits were not connected up with the conspiracies, and that they were received in evidence without ever showing that conspiracies had been formed-----	32
Appellant's contention No. 3—That the testimony of the Government's accountant—expert witness, Sauer, was erroneously admitted-----	37
Appellant's contention No. 4—That the court erred in sus- taining the Government's objections to certain questions propounded by appellant's counsel-----	45
Appellant's contention No. 5—That the court erred in over- ruling appellant's objection to a question propounded by Government counsel upon redirect examination of the witness Sauer-----	51
Appellant's contention No. 6—Failure of the trial court to direct a verdict for the appellant-----	53
Appellant's contention No. 7—The failure of the trial court to require the Government to make an election; and alleged error in permitting the jury to convict upon both counts-----	55
Appellant's contention No. 8—Respecting Government's prayers numbered 3 and 4-----	61
Appellant's contention No. 9—Pertaining to the court's charge to the jury-----	62
Appellant's contention No. 10—As to appellant's prayers which were denied by the court-----	65
Conclusion -----	67

TABLE OF CASES

	Page
<i>Arine v. United States</i> , 10 F. (2) 778_____	39
<i>Berger v. United States</i> , 295 U. S. 78_____	65
<i>Breese v. United States</i> , 203 F. 824_____	65
<i>Bruno v. United States</i> , 67 F. (2) 416_____	65
<i>Burton v. Driggs</i> , 20 Wall. 125_____	39
<i>Butler v. United States</i> , 53 F. (2) 800 (C. C. A. 10th)_____	39, 40, 42
<i>Davis v. United States</i> , 107 F. 753_____	37
<i>Eldredge v. United States</i> , 62 F. (2) 449_____	55
<i>Freigenbutz v. United States</i> , 65 F. (2) 122_____	37
<i>Fletcher v. United States</i> , 42 App. D. C. 53_____	59
<i>Fulton v. United States</i> , 45 App. D. C. 27_____	56
<i>Galbraith v. United States</i> , 257 F. 648 (C. C. A. 6th)_____	39
<i>Henry v. United States</i> , 50 App. D. C. 366_____	63
<i>Hoeppel v. United States</i> (#6625)_____	32, 36
<i>Hyde v. United States</i> , 225 U. S. 347_____	55
<i>Kolbrenner v. United States</i> , 11 F. (2) 754 (C. C. A. 5th)_____	39
<i>Lemon v. United States</i> , 164 F. 963 (C. C. A. 8th)_____	40
<i>Lorenz v. United States</i> , 24 App. D. C. 367_____	54, 57, 62
<i>Meadows v. United States</i> (#6531)_____	60, 64
<i>Means v. United States</i> , 62 App. D. C. 118_____	56
<i>Mendelson v. United States</i> , 61 App. D. C. 127_____	64, 67, 68
<i>Moyer v. United States</i> , 78 F. (2) 624_____	61
<i>Osborne v. United States</i> , 17 F. (2) 246 (C. C. A. 9th)_____	39, 41, 43, 52
<i>Remus v. United States</i> , 291 F. 501_____	54
<i>United States v. Kissel</i> , 218 U. S. 601_____	55
<i>Whitaker v. United States</i> , 63 App. D. C. 367_____	37

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v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE SUPREME COURT OF THE
DISTRICT OF COLUMBIA

BRIEF FOR UNITED STATES

STATEMENT OF CASE

Appellee, deeming the facts as stated in appellant's brief to be incomplete, inadequate and inaccurate in part, submits the following:

The April Term, 1933, Grand Jury returned an indictment in two counts on June 28, 1933, charging the appellant, Benedict M. McNeil and his father, Alexander McNeil, with the crimes of conspiracy (Title 18, U. S. C., Sec. 88) (R. 1-10). In the first count appellant and Alexander McNeil

are charged with conspiring, between February 1, 1925, and March 3, 1933, with Robert S. Stunz, to commit the offense of grand larceny, as condemned by Section 826 of the 1901 D. C. Code (Title 6, Sec. 60, 1929 D. C. Code), of the sum of \$50,000, the property of the Park Savings Bank. In the second count the appellant and Alexander McNeil are charged with conspiring, between February 1, 1925, and March 3, 1933, with the same Robert S. Stunz, who was an officer of the Park Savings Bank, for Robert S. Stunz to commit the offense of embezzlement, as condemned by Section 834 of the 1901 D. C. Code (Title 6, Sec. 76, 1929 D. C. Code) of the sum of \$50,000, the property of the same banking institution.

Robert S. Stunz committed suicide on or about March 14, 1933 (before return of indictment); and Alexander McNeil died of natural causes on February 16, 1934. Consequently when this case came on for trial in November 1935 the appellant was the only surviving member of the conspiracies, and he was therefore tried alone.

The appellant was an Assistant Cashier of the Park Savings Bank from a date prior to February 1, 1925, to August 13, 1929, after which date he ceased to have any official relationship with the institution. Robert S. Stunz was the Cashier and a Vice President of the bank from a date prior to February 1, 1925, to sometime in 1931, and from the latter date to the closing of the bank on March

3, 1933, he was the Executive Vice President. Alexander McNeil was merely a customer of the Park Savings Bank, and at no time did he have any official connection with the bank.

ERRORS CLAIMED BY APPELLANT

While appellant has assigned 68 errors (several of which, however, he has expressly abandoned), it is believed that these alleged errors, plus one not assigned, may properly be grouped under ten heads, and therefore we are taking the liberty of so considering them in this brief, as follows:

1. The contention that certain documents known as Head Teller's Daily Settlement Sheets were not properly proven.

2. The contention, relative to virtually all the accounting data and exhibits, that they were not connected up with the conspiracies and that they were received in evidence without any showing that conspiracies had been formed.

3. The contention that the testimony of the Government's accountant-expert witness, Sauer, was erroneously admitted.

4. The contention that the Court erred in sustaining the Government's objections to certain questions propounded by appellant's counsel.

5. The contention that the Court erred in overruling appellant's objection to a question propounded by Government counsel upon redirect examination of the witness Sauer.

6. The failure of the trial court to direct a verdict for the appellant.

7. The failure of the trial court to require the Government to make an election; and alleged error of the trial court in permitting the jury to convict upon both counts.

8. The contention respecting Government's prayers numbered 3 and 4.

9. The contention pertaining to the Court's charge to the jury.

10. The contention as to appellant's prayers which were denied by the Court.

DISCUSSION OF THE EVIDENCE

Because this case involves conspiracies to steal and embezzle the funds of a bank, by far the greater portion of the evidence adduced by the Government was documentary and of an accounting nature. Approximately 300 exhibits consisting of debit and credit memoranda, checks, books, and other records of the bank were offered by the Government and received in evidence. We shall endeavor, at this point in the Government's brief, to describe the exhibits, analyze the testimony of each witness related thereto, state the objectives sought to be proven, as far as documentary evidence is concerned, and discuss the manner by which the documentary evidence accomplished those objectives. This discussion will necessarily be confined principally to the evidence adduced in

the Government's case, with the interspersing, from time to time, of some of appellant's explanations of the transactions.

The Exhibits A-1 to A-64 inclusive are 64 debit and credit tickets, relating to the Sundry Collections Account in the Park Savings Bank, in the handwriting of the appellant, and covering a period beginning in 1925 and concluding with July 5, 1929. These tickets are all related and culminated in A-1, a credit ticket to Sundry Collections in the amount of \$26,030.

The B Exhibits (B-1-2-3-4-5a-5b) pertain to a \$10,000 transaction occurring on or about June 22, 1929.

The C Exhibits (C-1-2-3-4) pertain to a \$14,000 transaction occurring on July 5, 1929.

The D Exhibits (D-1-2-3-4a) pertain to a fictitious deposit made to the checking account of A. McNeil & Co. in the Park Savings Bank on February 17, 1931, of \$845.93.

The E Exhibits (E-1-2-3-5-6) relate to a fictitious deposit of \$1,000 made on June 1, 1931, and a fictitious deposit of \$1,250 made on June 11, 1931, in the checking account of A. McNeil & Co.

The F Exhibits (F-1-2-3-4-5-6-7-8-9-10-11) pertain to a fictitious deposit of \$950.25 made on January 8, 1932, to the A. McNeil & Co. account.

The G Exhibits (G-1-2-3-4) have reference to a fictitious deposit for \$350 made on March 28, 1932, in the A. McNeil & Co. account.

The H Exhibits (H-1-2-3-4-5-6-7) pertain to a fictitious deposit of \$76.25 made on April 26, 1932, in the same account.

The I Exhibits (I-1-2-3-4-5-6-7) relate to a fictitious deposit of \$587.10 made on May 28, 1932, in the same account.

The J Exhibits (J-1-2-3-4-5-6) concern a fictitious deposit of \$120 made June 4, 1932, in the same account.

The K Exhibits (K-1-2-3-4-5-6-7) refer to a fictitious deposit of \$957 made on August 2, 1932, to the same account.

The L Exhibits (L-1-2a-2b-3) relate to a fictitious deposit of \$420 made on January 13, 1933, in the same account.

The M Exhibits are as follows: M-1 is the bond given by Alexander McNeil for his appearance in this case. (This Exhibit was offered and received in evidence for the sole purpose of providing an exemplar of Alexander McNeil's handwriting.) M-2 is an impression of the Bank's corporate seal. M-4 is the certificate issued by the State of Alabama showing that the Park Savings Bank was duly organized under the laws of that State. M-5 is a permit issued by the Alabama authorities to the Park Savings Bank authorizing it to do business in the year 1933.

Exhibits P-1 to P-53, inclusive, are 53 records of the Park Savings Bank relating to an analysis of an account in the Bank known as "Collection Sundries."

The R Exhibits are as follows: R-1 is the General Ledger of the Bank. R-2 to R-10 are nine Cash Journals of the Bank covering the period from January 1929 to the close of the Bank on March 3, 1933. R-11 is the checking account of A. McNeil & Co. R-12 is the checking account of this appellant. R-13 and R-13a comprise the Collections Sundries account. R-14 is a brown envelope.

R-15 to R-57 comprise numerous checks and several debit memoranda charged against the account of A. McNeil & Co. in the Park Savings Bank.

R-60-61-62 are, respectively, signature card, deposit ticket, and ledger account, covering a checking account of this appellant in the Federal American National Bank and Trust Company in this city.

GEORGE E. WALKER, the Chairman of the Board of Directors of the Park Savings Bank, proved that the Bank was a corporation (Exhibits M2-3-4-5); that it was located in the District of Columbia; that Stunz was Vice President and Cashier of the Bank until 1931 when he ceased to be Cashier and became Executive Vice President; and that up until August 13, 1929, when he resigned, the appellant was an Assistant Cashier at the Bank (Rec. 30-31).

JAMES F. HITSELBERGER, the Head Teller at the Park Savings Bank, identified certain sheets known as Head Teller's Daily Settlement Sheets as being

Exhibits D-3, F-2, G-3, H-4, K-2, L-3, P-4, P-5, P-10, P-23, P-32, and P-41. Each one of these sheets reflects the settlement by each teller of his receipts and disbursements, the sheet being principally divided into two parts, the upper portion for "credits" or items coming into the Bank, and the lower portion for "debits" or items going out of the Bank. Both the debit and credit portions are divided into three main subjects, namely, "commercial" items, "savings" items, and "general" items. The "commercial" items comprise commercial account deposits and checks; the "savings" items are savings account deposits and checks; and the "general" items reflect, for instance, demand loans (Rec. 34-35).

Miss E. DEMAREST SIMPSON, the Head Bookkeeper of the Bank, identified R-11 as the checking account of A. McNeil & Co. and R-12 as the checking account of this appellant. She also identified as being in the handwriting of this appellant, 3 deposit tickets, B-1, for \$9,500, dated June 17, 1929, to the credit of A. McNeil & Co., B-2, for \$500, dated June 17, 1929, to the credit of appellant, and C-1, for \$14,000, dated July 5, 1929, to the credit of A. McNeil & Co. (Rec. 49-58), as well as B-3, a debit ticket purporting to debit a savings account of Robert P. Smith, dated June 17, 1929, for \$10,000, and C-3, a debit ticket, purporting to debit a savings account of one A. L. Williams, dated July 5, 1929, for \$14,000.

Miss Simpson also identified (Rec. 60-94) as being in Stunz's handwriting, the following Exhibits as records of the Park Savings Bank.

D-1, dep. ticket, A. McNeil & Co., \$845.93.
D-2, deb. ticket, Coll. Sundries, \$845.93.
E-1, dep. ticket, A. McNeil & Co., \$1,000.00.
E-3, dep. ticket, A. McNeil & Co., \$1,250.00.
E-6, deb. ticket, Coll. Sundries, \$2,250.00.
F-1, dep. ticket, A. McNeil & Co., \$950.25.
F-4, dep. ticket, J. A. Mendez, \$770.00.
F-5, dep. ticket, Coll. Sundries, \$4,912.50.
G-1, dep. ticket, A. McNeil & Co., \$350.00.
G-2, deb. ticket, Coll. Sundries, \$3,211.33.
H-1, dep. ticket, A. McNeil & Co., \$76.25.
H-2, deb. ticket, Coll. Sundries, \$484.25.
H-3, dep. ticket, J. Mendez, \$258.00.
I-1, dep. ticket, A. McNeil & Co., \$587.10.
I-3, dep. ticket, Coll. Sundries, \$861.70.
I-4, dep. ticket, Coyle Coll. a/c, \$691.50.
J-1, dep. ticket, A. McNeil & Co., \$120.00.
J-6, dep. ticket, Coll. Sundries, \$2,520.00.
K-1, dep. ticket, A. McNeil & Co., \$957.00.
K-3, dep. ticket, A. Hubschman, \$1,000.00.
K-4, dep. ticket, F. W. Bolgiano, \$700.00.
K-5, dep. ticket, J. M. Mendez, \$750.00.
K-6, dep. ticket, Coll. Sundries, \$2,502.00.
L-1, dep. ticket, A. McNeil & Co., \$420.00.
P-1, dep. ticket, Coll. Sundries, \$30,000.00.
P-6, dep. ticket, Coll. Sundries, \$19,650.00.
P-9, dep. ticket, Coll. Sundries, \$6,875.25.
P-11, dep. ticket, Coll. Sundries, \$4,000.00.
P-13, dep. ticket, R. S. Stunz, \$700.00.
P-14, dep. ticket, Kendrick &, \$50.00.
P-22, deb. ticket, Coll. Sundries, \$7,189.68.

P-24, dep. ticket, Coll. Sundries, \$3,900.00.
 P-33, dep. ticket, Coll. Sundries, \$4,600.00.
 P-34, dep. ticket, I. V. Darling, \$185.50.
 P-35, dep. ticket, D. Stunz, \$150.00.
 P-36, dep. ticket, J. Mendez, \$960.00.
 P-43, dep. ticket, Coll. Sundries, \$4,000.00.
 P-45, dep. ticket, Coll. Sundries, \$6,025.00.
 P-47, dep. ticket, Coll. Sundries, \$3,000.00.
 P-48, dep. ticket, Coll. Sundries, \$100.00.
 P-49, dep. ticket, Coll. Sundries, \$1,022.00.
 P-50, dep. ticket, Coll. Sundries, \$2,303.98.
 P-51, dep. ticket, Coll. Sundries, \$3,520.00.

Miss Simpson also identified (Rec. 65-103) as records of the Bank certain of her daily proof sheets, upon each of which is an adding machine tape prepared by her to prove and reconcile the deposits and checks, handled by the bookkeepers under her, with the head teller's daily settlement for the same day. Because of her daily contact with the head teller's daily settlement sheets referred to above, this witness identified them as records of the Park Savings Bank (Rec. 115). The bookkeeper's proof sheets are of the dates and bear exhibit numbers as follows:

C-4, dated July 5, 1929.
 F-3, dated January 8, 1932.
 G-4, dated March 26, 1932.
 H-5, dated April 26, 1932.
 I-6, dated May 28, 1932.
 I-7, dated May 31, 1932.
 J-4, dated June 4, 1932.
 J-5, dated June 6, 1932.

K-7, dated August 2, 1932.

P-42, dated March 15, 1932.

P-52, dated January 12, 1933.

P-53, dated January 13, 1933.

Miss Simpson also identified R-13 and R-13a as the "Collection Sundries" account of the Park Savings Bank and testified that all the deposit, debit, and credit tickets in connection with the Collection Sundries account, which are identified above, were posted in this account in her handwriting or under her supervision. She described this account as a suspense account; one which the bank, itself, maintained. The account contains three columns, one a credit column, another a balance column, and the third a debit column. A deposit ticket or credit ticket to Collection Sundries would be posted in the credit column, and the amount thereof added in the balance column so as to increase the balance; and a debit ticket to Collection Sundries would be posted in the debit column and the amount thereof deducted from the amount in the balance column so as to decrease that balance (Rec. 62).

Miss Simpson also identified (Rec. 106-108), as in the handwriting of this appellant, the following checks which were charged against the account of A. McNeil & Co. in the Park Savings Bank:

R-30, dated February 13, 1932, \$20.00.

R-35, dated March 21, 1932, \$350.00.

R-38, dated April 18, 1932, \$50.00.

R-42, dated May 2, 1932, \$100.00.

- R-43, dated May 2, 1932, \$100.00.
- R-46, dated July 18, 1932, \$750.00.
- R-48, dated August 11, 1932, \$25.00.
- R-57, dated February 13, 1933, \$750.00.

At this point, in order that the Court may have a description of the other items charged against the checking account of A. McNeil & Co., we are setting out the following list of checks, in the handwriting of Alexander McNeil and charged against the account in question. (Counsel stipulated as to the handwriting of Alexander McNeil upon these checks after MRS. NELLIE MOORE STEES had been called by the Government as a witness to prove such handwriting (Rec. 124-126).)

- R-15, dated October 1, 1930, \$267.00.
- R-16, dated October 15, 1930, \$350.37.
- R-17, dated October 17, 1930, \$228.56.
- R-18, dated June 1, 1931, \$50.00.
- R-19, dated June 2, 1931, \$555.00.
- R-20, dated June 2, 1931, \$225.00.
- R-21, dated June 2, 1931, \$50.00.
- R-23, dated June 16, 1931, \$750.00.
- R-24, dated June 18, 1931, \$10.00.
- R-25, dated October 15, 1931, \$267.00.
- R-26, dated October 15, 1931, \$379.05.
- R-27, dated January 5, 1932, \$250.00.
- R-28, dated February 2, 1932, \$120.00.
- R-29, dated February 2, 1932, \$70.00.
- R-31, dated February 12, 1932, \$25.00.
- R-32, dated February 15, 1932, \$5.00.
- R-33, dated February 17, 1932, \$3.50.
- R-34, dated March 1, 1932, \$3.00.

R-36, dated April 7, 1932, \$20.00.
R-37, dated April 11, 1932, \$35.00.
R-39, dated April 28, 1932, \$150.00.
R-40, dated April 28, 1932, \$70.06.
R-41, dated April 28, 1932, \$193.99.
R-44, dated May 28, 1932, \$120.00.
R-45, dated June 23, 1932, \$200.00.
R-49, dated August 1, 1932, \$335.00.
R-50, dated November 15, 1932, \$28.25.
R-51, dated November 15, 1932, \$239.30.
R-52, dated November 15, 1932, \$318.39.
R-54, dated January 12, 1933, \$335.00.

The following debit tickets charged against the account of A. McNeil & Co. were proven to be in the handwriting of Robert S. Stunz (Rec. 108):

R-47, dated July 5, 1932, \$100.00.
R-53, dated December 12, 1932, \$30.25.
R-55, dated January 16, 1933, \$100.00.
R-56, dated February 14, 1933, \$150.00.

MISS EMILY HARRISON, the Savings Bookkeeper at the Park Savings Bank, identified as in her own handwriting, two dummy savings cards (B-4 and C-3), which were prepared by her at the direction of Stunz (R. 121-123).

Mrs. LOUISE B. LARRICK, the General Bookkeeper, identified Exhibit R-1 as being the General Ledger of the Park Savings Bank, in which she posted the general accounts of the bank itself, such as "Sundry Collections", "Commercial" control, "Savings" control, Loans, etc. (R. 129). Each one of the general accounts has three columns, very

much like the three columns described above in connection with the Collection Sundries account. The "Commercial" and "Savings" controls reflected the daily change and status, in the aggregate, of the commercial and savings accounts in the Bank; that is to say, the balance columns would reflect at the beginning of a day's work the total amount of the liability of the Bank to its commercial (checking) and savings account depositors. At the end of each day's work the General Bookkeeper would post in the credit columns of these controls, figures which she got off the Head Teller's daily settlement sheet for that day, representing the aggregate of commercial and savings deposits. These figures would be added into the balance column in order to increase the total. At the same time she would post in the debit columns the aggregate, which she also got off the Head Teller's daily settlement sheet for that day, of all the commercial and savings checks drawn by customers of the Bank, and then would deduct these figures from the amount in the balance column so as to reduce the total. The result, in the orderly and regular course of business, would be that the commercial and savings controls should reflect the exact liability of the Bank to its customers at the end of any given day (R. 130).

Mrs. Larrick also identified nine Cash Journals of the Bank as Exhibits R-2-3-4-5-6-7-8-9-10 (R. 130).

Mrs. Larrick also identified (R. 141-150; 152-164), as in the handwriting of Stunz, the following debit and credit tickets of the Park Savings Bank:

- E-2, deb. ticket—Sundry Colls., \$1,000.00.
- E-4, deb. ticket—Sundry Colls., \$1,250.00.
- E-5, cr. ticket—Sundry Colls., \$2,250.00.
- F-6, cr. ticket—Demand Loans, \$1,850.00.
- F-7, cr. ticket—Demand Loans, \$400.00.
- F-8, cr. ticket—Demand Loans, \$25.00.
- F-9, cr. ticket—Earnings, \$107.34.
- F-10, cr. ticket—Earnings, \$18.60.
- F-11, cr. ticket—Sundry Colls., \$3,250.00.
- H-6, deb. ticket—Commercials, \$484.25.
- H-7, cr. ticket—Commercials, \$484.25.
- I-2, deb. ticket—Savings, \$2,140.30.
- I-5, cr. ticket—Commercials, \$2,140.30.
- J-2, deb. ticket—Savings, \$2,765.00.
- J-3, cr. ticket—Commercials, \$2,765.00.
- P-2, deb. ticket—Sundry Colls., \$30,000.00.
- P-3, cr. ticket—Sundry Colls., \$34,668.56.
- P-7, deb. ticket—Savings, \$26,250.25.
- P-8, cr. ticket—Commercials, \$26,250.25.
- P-12, deb. ticket—Real Est. Loans, \$4,000.00.
- P-15, cr. ticket—Demand Loans, \$200.00.
- P-16, cr. ticket—Demand Loans, \$100.00.
- P-17, cr. ticket—Demand Loans, \$2,400.00.
- P-18, cr. ticket—Demand Loans, \$2,700.00.
- P-19, cr. ticket—Earnings, \$120.00.
- P-20, cr. ticket—Earnings, \$97.43.
- P-21, cr. ticket—Demand Loans, \$822.25.

P-25, cr. ticket—Earnings, \$171.13.
 P-26, cr. ticket—Demand Loans, \$906.15..
 P-27, cr. ticket—Demand Loans, \$150.00..
 P-28, cr. ticket—Demand Loans, \$300.00..
 P-29, cr. ticket—Earnings, \$100.97.
 P-30, cr. ticket—Savings, \$11,931.52.
 P-31, deb. ticket—Int. Pd., \$11,931.52.
 P-37, cr. ticket—Commercial, \$5,895.50.
 P-38, cr. ticket—Service a/c, \$385.50.
 P-39, cr. ticket—Time Loans, \$303.00.
 P-40, deb. ticket—Savings, \$6,584.00.
 P-44, deb. ticket—Real Est. Loans,
 \$4,000.00.
 P-46, deb. ticket—Nat. Met. Bank,
 \$6,035.00.

Mrs. Larrick also identified all the debit and credit tickets, known as A-1 to A-64, as being in the handwriting of this appellant (R. 164). A description of these tickets appears in the record on pages 166 and 167.

Mrs. Larrick pointed out, as appearing upon the Head Teller's settlement sheets described above, certain items in the handwriting of Stunz. For example, in sheet Exhibit F-2 (Rec. 36), the figures \$6,632.75 in the block of Commercial credits, the figures \$5,925.94, in the block of General credits, the figures \$7,646.19, in the block of Commercial debits, and the figures \$4,912.50, in the block of Savings debits, are in Stunz's handwriting (R. 132-133).

The foregoing documents and papers, supplemented by oral testimony of witnesses for the Government, proved the following:

On February 28, 1925, a charge was made to the Sundry Collections account of the Park Savings Bank for \$4,000, and a corresponding credit was entered in the account of A. McNeil & Co. on February 27, 1925 (R. 188). This was the beginning of a series of debit and credit tickets (Exhibits A-1 to A-64 (R. 166), all in the handwriting of appellant, which culminated in a credit ticket to Sundry Collections on July 5, 1929, of \$26,030. (See testimony of witness Sauer, Record 187-197). In other words, the Sundry Collections Account had been debited over a period of four years with sums aggregating \$26,030 by tickets in the handwriting of appellant, at least a portion of which went to the credit of THE ACCOUNT OF A. MCNEIL & CO., WHICH WAS SUBJECT TO CHECKS SIGNED IN THE HANDWRITING OF EITHER APPELLANT OR ALEXANDER MCNEIL. On July 5, 1929, shortly prior to appellant's leaving the Bank, he wrote the ticket A-1 for \$26,030, purporting to credit the Sundry Collections account with the amount thereof which had theretofore been debited from the account. Stunz delivered that ticket to Mrs. Larrick to post both in the Cash Journal (R-2) and the General Ledger (R-1), and it was offset by a debit to savings control in the exact amount (R. 164-165). This was a fictitious debit, inasmuch as no one actually paid the \$26,030 on that day, but it had the apparent effect of clearing the \$26,030 permanently out of the Sundry collection ac-

count. At the same time, and because it was fictitious, it threw off the savings control to the extent of \$26,030 (R. 187). It was simply a "wash" transaction. Incidentally, the appellant, while on the stand, admitted that \$6,500 of the \$26,030 went to the A. McNeil & Co. account and still remained unpaid, although he included it in the credit to Sundry Collections on July 5, 1929 (R. 266).

EUGENE C. SAUER, a Special Agent of the Federal Bureau of Investigation, testified for the Government that in an interview which he had with this appellant between the date of the closing of the Park Savings Bank and the date of appellant's indictment, appellant stated that Exhibit A-1 included items of his own and of Stunz, and credits which had gone into the account of A. McNeil & Co., that is, that the \$26,030 transaction included items from which they had benefited personally (R. 176).

On June 22, 1929, the A. McNeil & Co. account was overdrawn \$8,285.76 (R. 50), and appellant's account was overdrawn \$499.57 (R. 54). By deposit ticket B-1 this appellant caused a credit to be entered in the A. McNeil & Co. account on June 22, 1929, of \$9,500, which cleared the overdraft and left a balance appearing therein; and by deposit ticket B-2 appellant caused a credit to be entered in his own account of \$500 on June 22, 1929, which cleared the overdraft and left a balance of a few cents.

On July 5, 1929, the A. McNeil & Co. account was overdrawn \$13,069.52 (R. 51); and on that date this appellant caused a deposit ticket, C-1, in the amount of \$14,000, to be credited to the account, as the result of which the overdraft was cleared and a balance appeared in the account. This appellant admitted upon cross-examination that a check signed by him was responsible for the overdraft in the A. McNeil & Co. account in July, but that the overdraft in June had been the result of his father's checks (R. 260).

After the closing of the Park Savings Bank in March 1933, Mr. Sauer was assigned by the Federal Bureau of Investigation to conduct an examination into the affairs of the Bank, and on one occasion when he was in the Bank examining the files, he found a sealed brown envelope (Exhibit R-14), upon the outside of which, in the handwriting of Stunz, were the words "B. McNeil, Personal." Mr. Sauer broke open the envelope and found therein, amongst other papers, Exhibits B-3, B-4, C-2, and C-3 (R. 174-175). (Exhibit A-1 was not found in this envelope, as erroneously claimed on page 11 of appellant's brief.) B-3, in the amount of \$10,000, bears the date of June 17, 1929, which is the same date as the deposit tickets B-1 and B-2, which also aggregate \$10,000. All three of these tickets are in appellant's handwriting. B-3 purports to be a debit to the savings account of one Robert P. Smith. A customer of

the Bank by the name of ROBERT P. SMITH was called by the Government as a witness and he testified that he never had a savings account at the Park Savings Bank, and that the transaction reflected by B-3 was not his (R. 128). The bank teller, CHARLES C. COLUMBUS, who handled two deposits on June 22, 1929, of \$500 and \$9,500, respectively, also handled a savings check in the amount of \$10,000 (R. 135).

C-2, which is a debit ticket for \$14,000 and is dated July 5, 1929, bears the same date as deposit ticket C-1, and both are in the handwriting of this appellant. The deposit of \$14,000 is entered out of order and in pencil at the bottom of the bookkeeper's proof sheet (page 2) for that date (R. 104).

Savings card B-4, headed "Robert P. Smith" and savings card C-4, headed "A. G. Williams", were prepared by the Savings Bookkeeper, Miss Harrison, at the direction of Mr. Stunz, who dictated the names, dates, and figures to her. She knew that they were dummy cards because she did not have anything in her work in connection with them. She delivered them to Stunz, and did not see them again until they were shown to her by Mr. Sauer after the Bank had been closed (R. 121-123). Debit ticket B-3 is entered as the first item on card B-4; and debit ticket C-2 is entered as the last item on card C-3. Appellant admitted on cross-examination that when he prepared debit

ticket B-3 he knew that Mr. Robert P. Smith did not have a savings account at the Bank (R. 261), and he did not know whose account was being debited by ticket C-2, as he did not know any one named A. L. Williams (R. 263-264).

The proof offered through the B and C exhibits, as well as Exhibits R-11, R-12, and R-14, plus the oral testimony of witnesses, showed that Alexander McNeil had overdrawn the A. McNeil & Co. account in June 1929 over \$8,000, and this appellant had overdrawn his own account for approximately \$500. This appellant prepared two deposit tickets which, when posted, cleared the two overdrafts. The deposits had to be supported by something, so appellant prepared a fictitious charge or debit ticket to a savings account that did not exist. This made it appear that funds were transferred from that account to the accounts in which he was interested. Again, in July 1929, the A. McNeil & Co. account was overdrawn in the amount of more than \$13,000, and appellant prepared a deposit ticket for \$14,000, which, when posted, cleared the overdraft. This deposit was supported by a fictitious charge or debit to another dummy savings account, in the manner very similar to the first one.

Next, Stunz caused fictitious savings cards to be prepared for these two dummy accounts, and also caused the items, reflected by the debit tickets in appellant's handwriting, to be posted thereon.

The cards were not filed with other savings cards, but were placed in an envelope in appellant's name, along with the fictitious debit tickets. Appellant suggests, on page 15 of his brief, that this *may have been* a "plant" by Stunz. The fact remains that the envelope contained fraudulent debit tickets in the handwriting of appellant.

On cross-examination, appellant testified that the money to support the \$9,500 and \$500 deposits came from a *savings* account of A. McNeil & Co. in the Bank (R. 260). There was some evidence that such an account existed at one time (R. 172) but it could not be found at the Bank (R. 222, 230).

As to the \$14,000 deposit on July 5, 1929, appellant testified that this was cash which he won as a bet on a horse-race, and that he deposited it in Mr. Columbus' cage, showing it to him at the time (R. 261). Mr. Columbus had no recollection whatever of such a deposit (R. 140). Appellant's explanation of this transaction, as narrated in the Bill of Exceptions (R. 262), is set out below:

That these funds were the funds of defendant; that the defendant won them as a bet on a horse on July 4, 1929; the horse was Eskimo and paid odds of 13 to 1. That defendant did not put up any money, having credit with the bookmaker, R. G. Luber; that this bet was placed over the telephone; that defendant did not know what the odds would be at the time he made the bet—that he just bet \$1,000 on Eskimo and the horse won;

that the last address the defendant had for Mr. Luber was Cavalier Apartments; that defendant had placed other bets with Mr. Luber; that he knew Luber's telephone number, but he does not remember it now; that if the bet had been lost, he could have paid the bookmaker because he had a little money at that time, about \$2,600 cash, in a safe deposit box at the Park Savings Bank in his own name. That defendant was with the Park Savings Bank twelve years; that the \$2,600 above referred to was profit from the sale of two hundred shares of Wright-Aerial at \$42 a share and sold for \$57; that the funds used to buy that stock were the funds of the Park Savings Bank; that this stock was held for three weeks and then sold, netting a profit of \$2,600 which profit the defendant kept; that that was the last transaction (meaning bet) he had in 1929; that he had won other days in 1929 before that last transaction but he does not recall how many. That defendant filed an income tax return for the year 1929 in which he did not report the \$14,000 that he won at the races; defendant identified his signature and handwriting as his original income tax return (R. 69) for the year 1929, as well as the return itself, as his own; that he reported a gross income of \$1,874.88, and after taking deductions he had a net income of \$138.88.

The A. McNeil & Co. account had no balance in it on August 6, 1929, but was overdrawn thereafter until June 14, 1930, when the overdraft was cleared

and no balance was left (R. 51). It remained in that condition until October 1930, when three checks (Exhibits R-15-16-17) aggregating \$845.93 were issued by Alexander McNeil and charged against the account, resulting in an overdraft in that exact amount. That overdraft remained without change until February 18, 1931, when Stunz prepared a deposit ticket (D-1) and caused it to be credited to the account, purporting to deposit \$845.93. That deposit ticket was not supported by cash or a check, but by a debit ticket to the Collection Sundries account of the Bank. (See the testimony of CHARLES HIRAM WARNER, Bank Teller, to this effect—Rec. 118-119). This ticket (D-2) bears the same date as the deposit, is for the same amount, and is also in Stunz's handwriting. Both the deposit and the debit are fictitious, inasmuch as there was no real—only a "watered"—balance to the credit of the Collection Sundries account. (The witness Sauer traced the P exhibits (P-1 to P-53) and showed that Stunz established purely fictitious balances in the Collection Sundries account of the Bank, so that when he issued tickets debiting that account in support of deposits which he made to the A. McNeil & Co. account, while it might appear to the employee handling the transaction that the credit was properly supported by a debit, in fact nothing of any value whatever was being transferred.) (See, for example, Record 182-183 and 204.)

When describing a deposit or other item as fictitious, the term is used in the sense that the Bank received absolutely nothing of value for the deposit, and that the tickets in support thereof were mere shams or pretenses.

Overt Act #1 is the overdraft caused by Alexander McNeil's check for \$267.00 (R. 15); and Overt Act #2 is the fictitious credit of \$845.93.

Overt Act #3 is the overdraft appearing in the A. McNeil & Co. account on April 14, 1931, of \$245.00 (R. 51).

On May 29, 1931, this same account had an overdraft of \$339.50 (R. 52) and on June 1, 1931, Stunz caused a fictitious deposit to be credited of \$1,000 (E-1). This cleared the overdraft; and thereupon Alexander McNeil issued checks (R. 18-19-20-21) which exhausted the balance then appearing, and caused another overdraft of \$333.00.

On June 11, 1931, Stunz caused another fictitious deposit to be credited, of \$1,250 (E-3), which cleared the overdraft (this is Overt Act #4); but again, Alexander McNeil drew checks (R-23-24-25-26) which consumed the balance then appearing, and created an overdraft on October 22, 1931, of \$640.05 (Overt Act #5).

The deposit (E-1) of \$1,000 was supported by a fictitious charge by Stunz to the Sundry Collections account, in like amount (E-2); and the deposit (E-3) of \$1,250 was supported by a fictitious charge (E-4) by Stunz to the same account. After

Stunz had charged the Bank's Sundry Collections account with these two items, totalling \$2,250, he cleared them out of that account by credit ticket E-5, and charged it against Collection Sundries by debit ticket E-6.

On January 9, 1932, Stunz caused another fictitious deposit (F-1), in the amount of \$950.25, to be credited to the McNeil Co. account (Overt Act #6), again clearing the overdraft that existed and leaving a balance. On the same day, another check (R-27), issued by Alexander McNeil on January 5, 1932, in the amount of \$250.00, was charged against the account, consuming a portion of the fictitious balance; and other checks for \$120.00 (R-28) and \$70.00 (R-29), respectively, also issued by Alexander McNeil, again caused an overdraft.

The deposit F-1 was not even supported by any direct charge to any other account of the Bank.

According to the tracing of this item which the witness Sauer made, it appears that on January 8, 1932, Stunz prepared three deposit tickets, F-1 for \$950.25, *supra*, F-4 for \$770.00, and F-5 for \$4,912.50, totaling \$6,632.75. Stunz entered this figure on Head Teller's settlement sheet for that day (F-2) under Commercial credits. Stunz also put through certain credit tickets (F-6-7-8-9-10-11) to General accounts of the Bank, aggregating \$5,925.94, which figure Stunz entered, in his own handwriting, under "General" credits upon F-2.

These two figures aggregate \$12,558.69. In order that the books and records of the Bank would reflect corresponding debits (for every normal banking transaction should reflect both a debit and a credit—see Record, page 258), Stunz entered on F-2, under “Commercial” debits, the figures \$7,646.19, and under “Savings” debits, the figures \$4,912.50, which totalled the same figure, namely, \$12,558.69. Sauer could find no debit tickets in the Bank to support the item, \$7,646.19, and the savings debit of \$4,912.50 was merely offset by the credit F-5. (See Record 206-208.)

As further evidence that this was a false transaction, the following was proven. The Head Bookkeeper reconciled her work with the Head Teller's settlement sheet each day. Her proof of this particular day's work appears on F-3 (R. 66). Her proof of “commercial” deposits should reflect \$98,209.83, as shown in the total of “commercial” credits on the Head Teller's sheet (F-2); and her proof of “commercial” checks should reflect \$129,668.17, as shown in the total of “Commercial” debits on F-2. However, an examination of her reconciliation (F-3), shows that she was obliged to add \$7,646.19 to prove her checks, and \$6,632.75 to prove her deposits. (See her testimony, Record page 67.)

On March 21, 1932, with \$6.20 in the A. McNeil & Co. account, this appellant issued a check for \$350 (R-35), which on March 22, 1932, was paid

and charged against the account, causing an overdraft of \$343.80 (Overt Act #7).

This overdraft was cleared on March 28, 1932, when Stunz caused a fictitious deposit for \$350.00 (G-1) to be placed to the credit of the account (Overt Act #8).

The deposit G-1 was supported by an improper debit (G-2) of the Collection Sundries account (R. 208-211; also 69-70).

Thereafter, two checks issued by Alexander McNeil (R. 36-37) were charged against the account, and on April 19, 1932, a check for \$50.00 (R-38), issued by appellant, was charged, causing another overdraft, this time of \$48.80. Stunz cleared this overdraft by another fictitious deposit ticket (H-1) on April 27, 1932, for \$76.25. This deposit was fictitious because it and two other deposits, likewise fictitious, were supported by an improper debit (H-2) to Collection Sundries (R. 211-212; also 72).

Then, Alexander McNeil issued a check (R-39) which exhausted the small balance created by the last fictitious deposit of Stunz, and made another overdraft. Thereupon, Alexander McNeil issued two more checks (R-40-41) and appellant issued two (R-42-43), which were paid and charged against the account and resulted in an aggregate overdraft of \$587.10 on May 25, 1932. This was cleared on May 31, 1932, by a fictitious deposit in Stunz's handwriting (I-1) in the exact amount.

This deposit was fictitious because it, along with two other fictitious deposits (I-3-4), was supported by a false and fictitious debit (I-2) of the "Savings" control (R. 212-213; also 77).

Another overdraft of \$120.00 by Alexander McNeil's check (R-44) occurred on June 2, 1932, which was cleared by a fictitious deposit (J-1), in the exact amount, by Stunz on June 6, 1932. This deposit, with another (J-6), was supported by another false debit (J-2) of the "Savings" control (R. 214; also 78-82).

With no balance at all in the A. McNeil & Co. account, this appellant issued and cashed a check in the amount of \$750.00 (R-46), which was paid and charged against the account, creating an overdraft in the exact amount on July 22, 1932. (This is Overt Act #9.)

ON AUGUST 3, 1932, STUNZ PREPARED AND CAUSED TO BE CREDITED TO THE ACCOUNT ANOTHER FICTITIOUS DEPOSIT (K-1), IN THE AMOUNT OF \$957.00 (OVERT ACT #10), WHICH CLEARED THE OVERDRAFT AND LEFT A BALANCE APPEARING THEREIN OF \$206.98. THEREUPON, STUNZ ISSUED A DEBIT MEMORANDUM AGAINST THE ACCOUNT FOR \$100 (R-47), APPELLANT ISSUED A CHECK FOR \$25.00 (R-48), AND ALEXANDER MCNEIL ISSUED FOUR CHECKS (R-49-50-51-52) WHICH CONSUMED THE BALANCE, AND MADE A NEW OVERDRAFT. The deposit K-1 was fictitious because it, together with deposits K-3-4-5-6, was arbitrarily charged against "Savings"

control, and with the exception of deposit K-3, there were no savings checks put through for this debit, to offset the deposits (R. 215-217).

On January 13, 1933, Alexander McNeil's check (R-54) made an overdraft in the account of \$242.98; and on that date, Stunz put through another fictitious deposit, of \$420.00 (L-1), which cleared the overdraft, and left a balance appearing therein of \$177.02. Deposit L-1 is Overt Act #11, and was fictitious because it was supported by a charge to Collection Sundries (See testimony of JAMES HOWARD HAUSER, Bank Teller, Record 151), at a time when there was no real balance to the credit of that account (R. 217-218).

STUNZ THEN CHARGED TWO DEBIT MEMORANDA (R-55-56) AGAINST THE ACCOUNT, LEAVING AN OVERDRAFT ON FEBRUARY 13, 1933, OF \$73.02. ON THAT SAME DAY, THIS APPELLANT ISSUED A CHECK UPON THIS ACCOUNT FOR \$750.00 (R-57), AND OPENED A NEW ACCOUNT IN HIS OWN NAME AT THE FEDERAL AMERICAN NATIONAL BANK AND TRUST CO. AND DEPOSITED THIS CHECK IN THAT ACCOUNT (R-60-61-62). (SEE RECORD 232.) WHEN THE CHECK WAS RECEIVED AT THE PARK SAVINGS BANK, IT WAS HONORED AND PAID AND CHARGED AGAINST THE A. McNEIL & Co. ACCOUNT, INCREASING THE OVERDRAFT, ON FEBRUARY 14, 1933, TO \$823.02 (OVERT ACT #12) (R. 53). THIS OVERDRAFT REMAINED UNPAID WHEN THE BANK CLOSED ON MARCH 3, 1933.

ARGUMENT

APPELLANT'S CONTENTION No. 1

That certain documents known as head teller's daily settlement sheets were not properly proven

The sheets in question are Exhibits D-3, F-2, G-3, H-4, K-2, L-3, P-4, P-5, P-10, P-23, P-32, and P-41.

These papers were identified, in the first instance, by the Head Teller of the Park Savings Bank, James F. Hitselberger (R. 32, 35), who identified them as records of the Bank, his handwriting appearing upon some of them.

These sheets were offered (1) to show Stunz's handwriting appearing upon them, (2) to show how the Head Bookkeeper reconciled her proofs, and (3) to show how the General Bookkeeper posted the "Commercial" and "Savings" controls. Mrs. Larrick identified Stunz's handwriting upon the sheets (R. 132-133); and Miss Simpson, the Head Bookkeeper, and Mrs. Larrick, the General Bookkeeper, were able to establish the authenticity of these papers by their daily contact with them (R. 115 for Miss Simpson's identification; and R. 130-131, and for example, R. 144, as to Mrs. Larrick).

It seems strange, indeed, that although almost 300 exhibits were proven most scrupulously and placed in evidence by the Government in this case, the appellant should select 12 of the same kind as the only ones of which to make complaint, when

these exhibits were identified by three different employees of the Bank having daily contact with them. The trial Judge could not possibly have committed error, we submit, in admitting these documents after their authenticity as records of the Park Savings Bank had been so firmly shown.

APPELLANT'S CONTENTION No. 2

That the accounting data and exhibits were not connected up with the conspiracies, and that they were received in evidence without ever showing that conspiracies had been formed

We take the law to be fully settled in the Federal Courts that the time-worn and oft-repeated contention, that a conspiracy must be proven before evidence as to the acts and declarations of the individual conspirators may be admitted, is completely rejected. This very contention was answered in *Hoeppe v. United States* (#6625), decided May 18, 1936, wherein it was held that the order of proof lies largely within the discretion of the trial court.

Appellant's counsel asserts on page 9 of his brief:

The record is teeming with items such as that just described, all received in evidence with no serious effort made to show any connection with any preexisting conspiracy, or any relation to the same, or any connection with appellant, or that he received any possible benefit therefrom, or that the same in

any wise affected the account of his father, A. McNeil & Co.

We take issue with every word of that statement, and challenge counsel at the oral argument of this case to point out one piece of evidence that has not been connected up.

The Government's theory, which, we submit, has been fully sustained by the evidence, is that, beginning as far back as February 1925, conspiracies were formed between the appellant, his father, Alexander McNeil, and Stunz, to obtain illegally and improperly the funds of the Park Savings Bank, and that these conspiracies continued until near the closing of the Bank on March 3, 1933.

There seems to be no dispute between appellant and appellee that Stunz was an embezzler. One contention of appellant is that there is no proof of any conspiracy between him and Stunz and his father. There are very few declarations in this case; the proof of the conspiracies has been established principally, we submit, by mute and immutable documentary evidence.

On February 27, 1925, \$4,000 improperly went to the credit of the account of A. McNeil & Co., which was subject to check by either appellant or Alexander McNeil. This amount was included in the series of debit and credit tickets, culminating in Exhibit A-1, credit ticket to sundry collections for \$26,030 on July 5, 1929. The appellant admitted in his interview with Special Agent Sauer

that this transaction included items from which he, the A. McNeil & Company account, and Stunz, had benefitted personally. The tickets (A 1 to A 64) were in appellant's handwriting, including the fictitious credit ticket (A-1) which made the records of the Park Savings Bank reflect the payment of the \$26,030 item, and which ticket Stunz directed the general bookkeeper to post in her books.

It will be remembered that it was not incumbent upon the Government to prove the substantive crimes of larceny and embezzlement, but merely conspiracies to commit these offenses.

Surely, if particularization is required, the foregoing contains evidence of a conspiracy between the three for Alexander McNeil to steal \$4,000 of the money of the Park Savings Bank, and also contains evidence of a conspiracy between them for Stunz to embezzle funds of the Bank.

From May 25, 1929, an overdraft in the A. McNeil & Company account gradually increased, until June 22, 1929, when it reached over \$8,000; that is, appellant or his father, Alexander McNeil, obtained \$8,000 of the Park Savings Bank's funds to which they were not entitled. A fictitious deposit of \$9,500 was then credited by appellant, which cleared the overdraft, and left a balance over, which was drawn out in several days. In other words, appellant or Alexander McNeil then improperly withdrew the funds of the Bank constituting the difference between the overdraft and the deposit.

On July 5, 1929, an overdraft of \$13,069.52 appeared in the account, that is, that sum of money, being the funds of the Bank, had been improperly withdrawn. Appellant then caused a fictitious deposit of \$14,000 to be made, which cleared the overdraft, and left a balance over, which, in turn, was also withdrawn.

Then, the evidence discloses Stunz causing dummy savings cards to be prepared to cover up the false offsets of appellant to these two fictitious deposits. Thus, again, there is evidence of a conspiracy between the three for Alexander McNeil to commit larceny, and also evidence of a conspiracy between the same three for Stunz to commit embezzlement. This proof was developed, in part, by the B and C Exhibits, and by Exhibits R 11, R 12, and R 14.

After appellant left the Bank, in the summer of 1929, there followed a series of ten fictitious deposits and numerous overdrafts in relation to the A. McNeil & Company account, occurring up to a date shortly prior to the final closing of the Bank. The D, E, F, G, H, I, J, K, L, and P Exhibits, principally in Stunz' handwriting, and R 1 to R 13, proved beyond a shadow of doubt, that the ten deposits were wholly false and fictitious. The other R exhibits, being checks drawn against the account, and in the handwriting of appellant and his father, Alexander McNeil, proved that they withdrew funds of the Park Savings Bank which

they knew were not theirs. These transactions are of three different kinds: (1) Where appellant and Alexander McNeil overdrew the account, and Stunz credited the account with a false deposit ticket in the exact amount of the overdraft; (2) where appellant and Alexander McNeil overdrew the account, and Stunz credited the account with a fictitious deposit ticket which was in excess of the overdraft, and which cleared the overdraft and left a balance over, which was then withdrawn by appellant and his father; and (3) where appellant and his father overdrew the account, and it remained in that condition at the time the Bank closed. The overdrafts, whether exactly covered, or not covered at all, are clearly evidence of a conspiracy for appellant and his father to commit larceny; and instances where Stunz improperly placed a credit to the account which made a balance available after clearing an overdraft are evidence of conspiracy for embezzlement on Stunz' part. Consequently, there was evidence in these transactions of conspiracy to commit larceny, separate and apart from evidence of conspiracy for Stunz to commit embezzlement.

As the Court said, in *Hoeppe* v. *United States*, *supra*:

While the evidence in the case is largely circumstantial, as is true in most conspiracy cases from the very nature of the charge (*Eastern States Lumber Assn. v. United States*, 234 U. S. 600, 612), we think that it

disclosed conduct and statements of defendants cooperating together to an unlawful end, inconsistent with any reasonable hypothesis of innocence.

See, also, *Whitaker v. United States*, 63 App. D. C. 367; *Feigenbutz v. United States*, 65 F. (2d) 122, 124; and *Davis v. United States*, 107 Fed. 753, 755.

APPELLANT'S CONTENTION No. 3

That the testimony of the Government's accountant-expert witness, Sauer, was erroneously admitted

Mr. Sauer, who had examined the books, documents, and other records of the Park Savings Bank during a very extensive investigation into the affairs of that institution after it closed its doors March 3, 1933, qualified as an expert in the following manner:

That he is employed by the Department of Justice, Federal Bureau of Investigation, and has been so employed for approximately six and one-half years; that he specializes in the investigation of accounting matters primarily, and has done so for six and one-half years; that he has had occasion in the past to investigate the books and records and the financial affairs of banking institutions; that witness holds a degree of Bachelor Commercial Science from Southeastern University in 1929 (having pursued the course there in accounting); that prior to entering the Bureau, witness was control ac-

countant at the General Accounting Office; that he has had occasion to testify in court in connection with his duties in respect to financial matters in connection with banking institutions in the course of which he has traced and analyzed books, records, and figures of banking institutions (Rec. 173-174).

He was called as a witness by the Government for the purpose, among others, of showing that the complicated books and records of the Park Savings Bank, upon analysis, disclosed that the credit ticket A-1, for \$26,030 and the deposits D-1, E-1, E-3, F-1, G-1, H-1, I-1, J-1, K-1, and L-1, were fictitious, and that the Collection Sundries account had no real balance to its credit.

Being an expert who had examined all the books and records of the Bank, his direct examination, with respect to the items in question was conducted in substantially the following manner: He was asked if he examined certain specified documents of the Bank in order to determine what they showed that the Bank received for the deposit or other credit item. His answer was in the affirmative. Every record which he examined had already been fully identified by employees of the bank (many tickets being in the handwriting of appellant or Stunz), had been received in evidence, and were shown and handed to the witness, their respective exhibit numbers being announced for the benefit of the record and of counsel for the appel-

lant. The witness was then asked what he found from those records that the Bank received for the item in question. His response was to the effect that the Bank received nothing. He was then asked to trace for the jury the exact course that his examination of the books and documents followed. (See Record, pages 178, 200, 205-206, for typical examinations to the foregoing effect.) His response, in minute detail, showed the jury and appellant exactly how the records of the Bank reflected his previous answer. All the exhibits were available to appellant's counsel during the trial, many of which they examined from time to time; the witness was subject to as sweeping a cross-examination upon these matters as counsel chose to conduct (appellant's counsel even interposed questions of the witness during his direct examination—Rec., 194, 195, 198); and thus the jury were properly left as the final arbiters of the facts to give such weight to the witness' testimony as they felt his examinations and explanations warranted.

The decisions of the Circuit Courts of Appeal were used as a guide in the direct examination of Mr. Sauer.

Butler v. U. S., 53 F. (2) 800 (C. C. A. 10th); *Osborne v. U. S.*, 17 F. (2) 246 (C. C. A. 9th) (cer. den. 274 U. S. 751); *Galbraith v. U. S.*, 257 F. 648 (C. C. A. 6th); *Kolbrenner v. U. S.*, 11 F. (2) 754 (C. C. A. 5th) (cer. den. 46 Sup. Ct. 489); See *Burton v. Driggs*, 20 Wall. 125; *Arine v. U. S.*,

10 F. (2) 778 (C. C. A. 9th) ; *Lemon v. U. S.*,
164 F. 963, 960 (C. C. A. 8th).

Butler v. United States, supra, was a prosecution for using the mails to defraud. The defendant had been the president of a certain company and as such had used the mails to sell fraudulent loans to banks. On appeal from a verdict and judgment of guilty, the Circuit Court of Appeals said, at page 805:

Complaint is made because of the admission of the testimony of an auditor as to what the books of the company disclosed.
* * * There were 75 to 100 of such books of account and accompanying files. What the books disclosed was pertinent evidence as to many of the issues. It was not only proper to use an auditor—it was the only practicable way to get before the jury the evidence in the books. The court amply safeguarded the rights of the appellant by requiring the government to furnish him for the use of his counsel and auditor, a copy of the audit; by assuring appellant access to the books, which were in the court room, for the purpose of checking the audit; and by affording ample opportunity to cross-examine. It is objected that the books were not introduced in evidence; the books were available to both sides; they were identified, and that is sufficient. To introduce them would have been a meaningless formality. An auditor may testify as to what is disclosed by books of account, if the books are

identified as those regularly kept in the course of business, and if the books are available for purposes of cross-examination.

Osborne v. United States, supra, was a prosecution for using the mails to defraud. The fraudulent scheme used by the defendant involved a company which sold cemetery lots. The books of this company were introduced in evidence. On appeal from a verdict and judgment of guilty, the Circuit Court of Appeals said, at page 249:

An expert witness called by the government testified to certain computations taken from the books in evidence, and the admission of this testimony is assigned as error. In so far as the assignment is based on the competency of the books themselves, it has already been disposed of, and, *where complicated books of account are in evidence and elaborate computations are necessary to determine the results and the amounts evidenced by the books, the rule is well settled that an expert may be called upon to make such computations and state them to the jury. Cooper v. United States (C. C. A.) 9 F. (2d) 216; Arine v. United States (C. C. A.) 10 F. (2d) 778.* While some of the conclusions of the expert may have been improper and immaterial, his conclusions were based on evidence already before the jury, and we fail to see wherein the testimony could be at all prejudicial. [Italics supplied.]

Let us consider, as a typical instance, the problem of proof in establishing, for the benefit of the jury, that when Stunz caused the deposit ticket D-1 for \$845.93 to be credited to the account of A. McNeil and Company, the bank was in fact receiving or transferring nothing of value, and the deposit was a mere sham to wipe out an overdraft caused by Alexander McNeil. Miss Simpson identified the deposit ticket (D-1) as a record of the Park Savings Bank in the handwriting of Stunz. She also identified, as in Stunz' handwriting, a debit ticket (D-2) to Collection Sundries, bearing the same date as D-1, and being in the same amount. The Government knew, from Mr. Sauer's investigation, that D-2 was the voucher which supported the deposit D-1, and also knew that D-2 was fictitious because there was no real balance in the Collection Sundries account, and therefore D-1 was fictitious. Neither Miss Simpson nor any other employee could testify to these things, because they had no personal knowledge of them, having not followed them through the Bank. Therefore, the alternatives were either to show the pertinent set of exhibits to the jury and indulge in the rash assumption that they could see the situation for themselves, or place on the stand an expert auditor and accountant who could trace the transaction before the jury through the various books and records. As was said in the *Butler* case, *supra*, the use of the auditor "was the

only practicable way to get before the jury the evidence in the books.”

Appellant mentions the *Osborne* case, *supra*, agrees that it reasonably accurately states the law upon the subject, and then undertakes to assert that the decision excludes such testimony as that of Mr. Sauer, quoting, apparently in support of such assertion, a portion of the court's opinion relating to the competency of the books themselves. The quotation has absolutely no application to the case at bar, for the objections there stated do not obtain here, and moreover, we do not recall that any question has been seriously raised in this case as to the *competency* of the documentary proof.

Appellant complains that Mr. Sauer stated conclusions and expressed opinions. While we believe this was done only where it was entirely proper for him, as any other expert, to do so, still no error was committed in any event, for the court said in the *Osborne* case, *supra*:

While some of the conclusions of the expert may have been improper and immaterial, his conclusions were based on evidence already before the jury, and we fail to see wherein the testimony could be at all prejudicial.

Finally, in his attack upon Mr. Sauer, counsel for appellant tells this Court that this witness was proven to be mistaken in one piece of his testimony; and, in effect, that if counsel's predecessors had probed thoroughly other features of it, it is

reasonably certain that it would have been revealed that Sauer was otherwise mistaken; *ergo*, the case should be reversed. The mere statement of this proposition is sufficient to demonstrate its fallacy.

However, we submit that Sauer was not incorrect, and that appellant has confused several pieces of testimony in stating his point.

In the first place, we do not find in the Record (page 187) that the testimony of Sauer, quoted at the bottom of page 11 and the top of page 12 of appellant's brief, was made over appellant's objection, as claimed by appellant. Secondly, the statement contained therein that "he (Sauer) found no check or charge going to any individual account", has no relation to the other quotations found on pages 12 and 13 of appellant's brief. Sauer was simply showing that when "Savings" control was debited for \$26,030 in order to offset the false credit A-1, it was a fictitious debit, because the only time properly to debit the "Savings" control of the Bank was when individual savings depositors withdrew funds from their accounts, and he found no such withdrawal.

Thirdly, we do not find on page 220 of the Record (appellant refers to it as page 137), or at any other point where "Sauer was forced to admit that his testimony just recited and the implications therefrom were so grossly incorrect as to be shocking", as stated on page 12 of appellant's brief. Appellant's quotation from page 220 of the Record (his

page 137) is not literally accurate, and we therefore respectfully refer the Court to the Record itself for the exact narrative. At this point, Sauer was simply being cross-examined as to the items which made up the total of \$26,030 on *credit ticket A-1*. This had nothing to do with any "check or charge going to any individual account" to support the *debit to "Savings" control*. Sauer merely stated, as shown on page 220 of the Record, that "so far as he could determine not only the \$6,500 item (in the \$26,030), but all of the items *were the McNeil Company's*"; and then stated that the \$6,700 item and the \$7,000 item (also in the \$26,030) "*did not get into the McNeil account.*"

And lastly, the quotation on page 13 of appellant's brief from page 194 of the Record (his page 113), is part of Sauer's direct examination relating to the reduction of one item from \$16,500 to \$6,500, and is entirely consistent with his cross-examination in that connection as narrated in the preceding quotation appearing on the same page of the brief.

APPELLANT'S CONTENTION No. 4

That the court erred in sustaining the Government's objections to certain questions propounded by appellant's counsel

A

Appellant complains that the lower court erred in refusing to permit the Government's witness,

Walker, to be asked on cross-examination the following question:

What are the duties of a director of a bank? (Rec. 31).

Under no possible theory could this inquiry be relevant or material. The appellant was not a director of the Park Savings Bank; and in no manner was the subject matter of this question in issue. Appellant's counsel, in the trial below, did not indicate to the court the relevancy or materiality of this question, and appellant's counsel, in this Court, has failed to state anything at all in this regard.

B

Appellant gives over nearly the entire page 16 of his brief to a criticism of the trial judge in refusing to allow a question to be asked Government's witness Sauer on cross-examination, which question is quoted in the brief as follows:

Did it not also appear that there was a note in the nature of a blanket note that was to take care of any amount in excess of the sum he had on deposit?

Appellant complains of the foregoing upon the ground that the pronoun "he" appearing in the question referred to him, and thus the question was quite material.

The question has not been accurately quoted, and the complaint made by appellant is utterly baseless. The question as it appears at page 227 of the record is as follows:

Did it not also appear that there was a note in the nature of a blanket note that was to take care of any amount in excess of the sum he (Hubschman) had on deposit?

Appellant's counsel was endeavoring to inquire, not as to a matter in which the appellant was interested, but in respect of a transaction had between the bank and a third person (Hubschman) whose affairs in no wise affected the appellant. This question was clearly irrelevant and immaterial.

C

Appellant complains next about the refusal of the trial judge to permit the following question to be asked of the Government's witness Sauer on cross-examination:

Was there not other stock—approximately one-half of the stock of that bank—in the bank and owned by the bank?

This question was wholly irrelevant, and was objected to, and the objection was sustained by the court, upon that ground (Rec. 228).

Just prior to asking this question counsel for appellant had pursued a line of inquiry which developed that Mr. Sauer had found about one-fifth of the bank's stock in Stunz' desk drawer. The following question was then asked (Rec. 227):

Did you find any more of the stock anywhere else in the bank, which did not belong to customers?

To which question the following answer was given by the witness (Rec. 227) :

The one-fifth, or approximately 1,800 shares, was largely in the Stunz drawer. That was the entire list of stocks that I had listed, some of which were in the note teller's cage in a box but most of which was in Mr. Stunz.

The question complained of did not, in the manner in which it was phrased, relate to any of the conspirators involved in this case, but clearly appears to be a general inquiry. In any event, it is plain that the witness' answer to the next preceding question indicates that nothing could have been gained by asking the question discussed under this point.

D

Appellant next complains of error on the part of the trial judge in refusing to permit the following question to be asked:

Now, I will ask you, Mr. Sauer, if in Mr. Hubschman's case the same thing was not done, that is, if a signed note was not left at the bank to take care of overdrafts? (Rec. 228).

Obviously what the bank did as to other customers, whether proper or improper, could have no bearing whatever upon the guilt or innocence of this appellant.

E

Upon his direct examination of his witness Moran appellant propounded the following ques-

tion, which was objected to, and the objection sustained:

And was not the \$10,000 note, shown by the records and by the correspondence of the attorney for the bank, as given to the bank in payment of obligations of Alexander McNeil? (Rec. 241).

This question is plainly objectionable as requiring the witness to testify as to hearsay, in that the records and correspondence, and the testimony of the attorney for the bank, would have been the way to prove the point.

F

The following question propounded upon the direct examination of the appellant was objected to and the objection sustained:

Mr. McNeil, if Mr. Stunz put in a deposit ticket, let us say of \$350 or \$500 to the credit of A. McNeil Company, and there was a note given to the bank at that time, if the account were credited with, let us say, the sum of \$350 and if the note were posted in the records of the bank, would that be a proper offset to the item? (Rec. 259).

It is manifest that this question was not proper, in that it is hypothetical and argumentative.

In any event, it appears that the information sought to be elicited from the witness by the objectionable question got into the record through other questioning, for the following also appears at record, page 259:

That witness gave the bank the note that he referred to of \$6,400 and also the note for \$350 made by Fred DiZerega; that defendant took the \$350 note to the bank; that he discounted it with Mr. Stunz; that that was put on the note ledger; that it should have appeared in the note ledger; the other notes should have appeared in the note ledger; if the other notes had appeared in the note ledger that would have balanced off the items against that sum; that there was no item which defendant drew from the bank which was not supported by a note or other form of credit; and that the collateral for that note was the Sherwood property and the Inn property.

G

Finally, under this point, appellant complains of the refusal of the court to permit him to testify as to a conversation between him and Stunz with reference to the latter's purchasing large blocks of stock in the Park Savings Bank (Rec. 277).

His answer would necessarily be self-serving, and the question was therefore objectionable on that ground, as well as on the ground of immateriality. Even assuming, *arguendo*, the competency of the appellant to make answer to the inquiry in question, what was said concerning the purchase of stock was wholly immaterial as the conspiracies in no way related to this matter. It is apparent that this question was asked in an effort to show that appellant's interference with Stunz's purchasing of the bank's own stock inured

to appellant's detriment. This evidence was placed before the jury, for, in spite of appellant's inability to answer the contested question, he did testify (Rec. 277) that about one month after his conversation with Stunz concerning the latter's purchase of the stock, defendant's resignation was requested.

APPELLANT'S CONTENTION No. 5

That the court erred in overruling appellant's objection to a question propounded by Government counsel upon redirect examination of the witness Sauer

On redirect examination, the Government's witness Sauer was asked the following question:

In the course of your examination of the records and books of the Park Savings Bank, particularly with reference to the A. M. McNeil Company account, when you found one of those credits that you have described as fictitious was put to the account to clear an overdraft and which left a balance over, when that balance was drawn out whose funds were drawn out at that time? (Rec. 231).

The grounds of the objection made in the court below to this question were entirely different from the grounds stated on page 17 of appellant's brief. The sole objections below were that the question was not proper rebuttal and that it had been asked before. The record discloses that it had not been asked before and Government counsel asked and

obtained permission to propound the question as examination in chief. This was clearly a matter resting within the sound discretion of the trial judge. See *Osborne v. United States, supra*. If the question was so inherently vicious, as now claimed by appellant's *present* counsel, it should have been seasonably called to the attention of the trial judge and Government counsel. Certainly, there is no rule of practice which allows one attorney to make one objection in the trial court and another attorney to make another and different objection in the appellate court.

Moreover, the witness Sauer was testifying as an expert who was entirely familiar with the financial and accounting structure of the Park Savings Bank. His answer was:

The withdrawal of that balance was the withdrawal of a portion of the bank's assets or the bank's funds.

The question and answer disclosed to the jury the simple proposition that when a balance was established in an account by a fictitious credit, the withdrawal of that balance constituted a withdrawal of the bank's own funds. The language of the question does not carry the imputations attributed to it by appellant, but was obviously so phrased for the single purpose of directing the witness' attention to the numerous deposits which, by his own testimony, he had established to be fictitious, so that the witness' answer would relate to

that kind of transaction. It is submitted that the criticism of this question which has been stated by appellant's counsel is not justified, particularly in view of the fact that at an earlier point in the trial appellant's counsel stipulated with Government counsel as follows:

That whenever a check was charged against either of these accounts, being, respectively, A. McNeil Company (R-11) and B. M. McNeil (R-12), which was thereby paid resulting in the reflection of an overdraft in that account, the overdrawn funds used to pay that check or those checks were the funds of the Park Savings Bank (Rec. 205).

APPELLANT'S CONTENTION No. 6

Failure of the trial court to direct a verdict for the appellant

Under this point we shall discuss the two grounds stated in assignments of error numbered 60 and 61. These grounds are (1) that there was no evidence establishing a continuing conspiracy; and (2) that the statute of limitations barred prosecution under the indictment involved in this case.

It is submitted that our discussion under "Appellant's Contention No. 2", *supra*, fully sustains the proposition that there was abundant evidence of the two conspiracies beginning in 1925 and continuing up until the early part of 1933. However, it is the Government's contention that it is unnecessary, as a matter of law, to establish continuing

conspiracies from the first date until the last date mentioned in an indictment (*Remus v. United State*, 291 Fed. 501, 505), but that the proof of the existence of conspiracies, by circumstances and the doing of an overt act to effect the purpose thereof, within a period of three years before the indictment is returned, is all that is required. We have demonstrated in this brief, and the record fully sustains us, that every overt act alleged in relation to both conspiracies was not only fully proven, but occurred within three years before the indictment was returned. Appellant makes the absurd contention that every overt act done to effect the object of a conspiracy must occur within three years from the time that it is charged that the conspiracy was formed. This position necessarily involves the assertion that no conspiracy under the Federal Statute can possibly extend beyond three years. Such contention was fully considered in the case relied upon by appellant, namely, *Lorenz v. United States*, 24 App. D. C. 367, wherein this Court, at page 387, said:

The contention on behalf of the appellants is that, if the conspiracy was in fact formed, and a single act in aid of its object committed, more than three years before the finding of the indictment, then the offense was barred by the statute of limitations; and that no other like act or acts, committed within three years, would amount to a renewal or continuance of the conspiracy so as to remove the bar.

We cannot agree with this contention. Undoubtedly, as argued, the conspiracy is the gist of the offense defined in Section 5440, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3676), though it is not indictable until some act shall have been done by one or more of the conspirators to effect the object of the corrupt agreement. The offense is then complete as to that act, and the statute at once begins to run; but it does not follow that all similar acts thereafter may be committed with impunity. Through the repetition of such acts—overt acts, as they are commonly called—the conspiracy is made a continuing offense. By each subsequent act it is repeated and entered into anew.

See to the same effect *Hyde v. United States*, 225 U. S. 347, at page 367 *et seq.*, in which the Supreme Court relies upon its previous statements in reference to the law of conspiracy in the case of *United States v. Kissel*, 218 U. S. 601; and *Eldredge v. United States*, 62 F. (2d) 449, in which the defendants were tried and convicted upon counts charging conspiracy to embezzle and conspiracy to make false entries to conceal the embezzlements.

APPELLANT'S CONTENTION No. 7

The failure of the trial court to require the Government to make an election; and alleged error in permitting the jury to convict upon both counts

Appellant contends that the two counts of the indictment—one charging conspiracy to commit

larceny, and the other, conspiracy for Stunz to commit embezzlement—are inconsistent and repugnant, and therefore, the Government should have been required to elect upon which count it desired to go to the jury.

Even assuming for the moment that these counts are repugnant, there is no duty under the decisions of this Court resting upon the Government to make an election.

Fulton v. United States, 45 App. D. C. 27.

Means v. United States, 62 App. D. C. 118.

In *Fulton v. United States*, *supra*, where one count charged embezzlement of property, as the property of A, and another count charged embezzlement of the same property as that of A and others, this Court held that an election was not required. It was stated (p. 41):

* * * the prosecution is seldom if ever required to elect upon which of several counts charging the same offense, but in various ways, it will stand. *Herman v. People*, 131 Ill. 594, 9 L. R. A. 182, 22 N. E. 471. It might well be that to insist upon such an election would result in a failure of justice, owing to the fact that the jury might take a different view of the evidence than the prosecuting officer.

In *Means v. United States*, *supra*, where the act was charged in one count as larceny, and in another as embezzlement, this Court held that it was not error in refusing to require the Government to elect.

Clearly, if different but related crimes, supported by separate evidence, are involved, no election is required, and the trial judge's discretion in refusing to require one will not be interfered with. This Court so held in *Lorenz v. United States*, *supra*, where several defendants were put to trial upon separate charges of conspiracy to defraud the United States. The Court said, at page 367:

The next question for consideration is presented by the assignment of error on exceptions taken to the refusal of the court to require the prosecution to elect upon which one of the twelve counts of the indictment the defendants should be tried. Whether such a request should be granted depends upon the special circumstances of the case, and rests in the sound discretion of the trial court. We are of the opinion that there was no abuse of that discretion in this case.

Having established that there was no duty to elect, the next question is whether the trial judge should have instructed the jury that if they convicted upon one count they would have to acquit as to the other. The following occurred when this point was reached during the trial (Record, 278):

At the conclusion of the consideration of the prayers, the District attorney, in open Court and out of the presence of the jury, inquired of defense counsel as to what their position was on the question of whether the jury should be instructed that it could find a verdict of guilty on both of the counts, or

on one or the other of them. They declined to announce their position, and inquired of the District Attorney as to the Government's position. The District Attorney stated that it was his view that the jury should be allowed to return verdicts of guilty upon both counts. Whereupon, the Court stated: * * * "So I think it must necessarily be for this jury to say whether there was such a conspiracy, and, if so, whether it was to commit the crime of larceny, or the crime of embezzlement, or both. I think I shall have to explain to the jury, in some such manner as I have indicated, unless you see objection to that." The District Attorney stated that he considered it a correct statement of the law. Defense counsel made no comment, nor did they object or except to the Court's statement.

It will be seen that the judge felt that the jury should determine from the evidence, whether there was a conspiracy to commit one offense or the other, or whether there were conspiracies to commit both offenses. He inquired of counsel as to whether they objected to this. Appellant's counsel made no comment. Accordingly, when he charged the jury, the judge instructed them to reach a verdict as to each count. Appellant's counsel again made no objection (Record 288).

Upon the Government's theory there was separate evidence in support of both these counts, and if the jury so believed, they could convict upon

both of them. We submit that we have demonstrated the existence of this separate evidence in our discussion under "Appellant's Contention No. 2", and in this regard we have accepted the challenge of counsel for the appellant set forth on page 18 of his brief.

Moreover, it will be remembered that the two crimes charged are conspiracies and not the substantive crimes of larceny and embezzlement. (Compare, *Fletcher v. United States*, 42 App. D. C., 53). We submit that the same evidence may prove two conspiracies to commit different offenses, and still not result in repugnant verdicts of conviction. For example, suppose A, B, and C meet and conspire for A and B to rob, and for C to rape D, a woman, and A does an overt act, namely, telephones D to meet him at a certain place. Thereupon, A, B, and C are arrested and indicted in one count for conspiring to rob D, and in another count for conspiring to rape D. The identical proof is offered in support of both offenses at their trial. There could be no doubt that, in the first place, no election as to counts would be required, and secondly, that the jury could convict upon both counts. It is not a single crime—two crimes have been committed. And so with the case at bar. There is evidence that Stunz, appellant, and Alexander McNeil conspired to steal money of the Park Savings Bank, and that the three conspired for Stunz to embezzle the funds of the same bank. The offenses

are related, in that all the evidence adduced as to one offense could be adduced as to the other, yet, not a single conspiracy has occurred, but two different conspiracies.

But, in any event, is it possible under our practice for one attorney representing a defendant at his trial to acquiesce in a ruling of the trial judge—acquiesce, not through oversight, but by his silence after the very question has been brought squarely to his attention to comment upon—and then have another lawyer come into this Court and complain about the action of the lower court? Surely, the judge and the Government have certain rights that are just as sacred as those of a defendant charged with crime.

There was no murmur of objection or exception to the announcement of the court that the jury had to determine whether they would convict upon one or both counts, or upon none; and under the circumstances we respectfully submit that complaint cannot properly be made in this Court. We are aware of the decision of this Court, handed down March 9, 1936, in the case of *Meadows v. United States* (#6531), but surely such a rule (upon which we shall comment under Point 9) could never be extended to a situation which has just been described.

APPELLANT'S CONTENTION No. 8

Respecting Government's prayers numbered 3 and 4

The sole complaint respecting these two prayers is that they instructed the jury that they could find the defendant guilty if they believed that *he alone* had committed any acts which amounted to larceny and embezzlement.

As is well known to the Court and counsel the Federal conspiracy statute provides that if two or more persons conspire to commit *any offense against the United States*, and an overt act is committed, they are guilty. Of course, larceny and embezzlement, as denounced by our local Code, are offenses against the United States. These points were fully covered in Government's Prayer No. 1 (Rec. 280). It was next incumbent upon the trial judge to acquaint the jury with the elements of the offenses conspired to be committed. *Moyer v. United States*, 78 F. (2d) 624, 626. This is all that was accomplished by Government's Prayers numbered 3 (Rec. 280) and 4 (Rec. 281). No one can fairly separate these prayers from the other prayers or from the court's charge as a whole in which primary emphasis was placed upon the crimes of conspiracy. Defendant's Prayers No. 4 and No. 8 (Rec. 282) also fully safeguarded the appellant in the connection now complained of.

It will be particularly noted that appellant, in his brief, does not dispute the principles of law con-

tained in Government's Prayers numbered 3 and 4. The Government had these principles in mind in its discussion under Point No. 2.

APPELLANT'S CONTENTION No. 9

Pertaining to the court's charge to the jury

This discussion will be divided into three parts, the first two of which will undertake to answer appellant's complaints relating to portions of the lower Court's charge which were excepted to, and the third will state the Government's position as to appellant's general criticism of the charge.

A

Exception was taken to the following statement of the trial judge to the jury:

In that connection you are told that every overt act done in furtherance of a conspiracy has the effect of continuing the conspiracy and keeping it in existence (Record, 286).

This is plainly the law as this Court announced it in *Lorenz v. United States, supra*.

In this connection the Court told the jury that it was necessary for the Government to show that at least one overt act was committed within three years prior to the return of the indictment (Rec. 286). Appellant's contention that the overt act had to be committed within three years from February 1, 1925, has been answered under Point 6.

B

Exception was taken to the following portion of the Court's charge:

If you find that Robert S. Stunz was in direct charge of the bank and its affairs and its operations, you may conclude that he had in his possession and under his care the property and funds of the bank (Record, 287).

It is certainly an accurate statement of the law that the executive and managing officer of a bank has the possession and care of the funds of the bank, within the provisions of the embezzlement statute, *supra*. See this Court's interpretation of this statute in *Henry v. United States*, 50 App. D. C. 366.

C

Again, appellant's *present* counsel undertakes to make objections in this Court that were not raised below.

Pages 32 and 33 of his brief are given over to a general criticism of the judge's charge in respect of defining the law of conspiracy.

In the first place, it is submitted that the judge's charge was fair, clear, unambiguous, and comprehensive. It covered the law of the case thoroughly, and in a manner that was understandable to the jury. There is no claim, in this connection, that mistakes were made in what was stated by the judge, but only that he did not state enough. This

is a relative matter which could never satisfy one whose criticism of the Court and the Government's case is couched in loose and general terms, and in some instances is based upon premises that are inaccurate.

In the second place, the matters here complained of were not called to the attention of, or excepted to in, the lower Court. The only features of the judge's charge complained of (with the exceptions of the prayers themselves) were those appearing on page 288 of the Record. Two of them have been mentioned above, and the third one, having no relation to the present discussion, was abandoned.

Moreover, the alleged error now under discussion was not even assigned by the appellant. The Government objects to the consideration by this Court of this point. In addition, it is submitted that "a plain error vital to a defendant" has not been committed, and for all these reasons, the decision of this Court in the *Meadows* case, *supra*, is not applicable. May we recall at this time, what this Court said, in reference to this matter, in *Mendelson v. United States*, 61 App. D. C. 127, at page 129:

But, even if this were otherwise, the record does not show that any exception was taken to the remarks of the court, which in itself would make it improper to review the question. See our opinion in *Norman v. United States*, 20 App. D. C. 494, 497, in which we said: "It would not be fair to the court or to the jury, or to the parties to the

cause, to permit it (the court's charge) to pass unchallenged at the time, and then on account of it to seek reversal in the appellate tribunal."

APPELLANT'S CONTENTION No. 10

As to appellant's prayers which were denied by the court

PRAYER NO. 5

This prayer (Rec. 288) contemplated that the jury be required to find that a conspiracy existed between all three of the individuals named, whereas it is elementary that proof of a conspiracy between two of them (one of whom being the defendant) would be sufficient. *Berger v. United States*, 295 U. S. 78, 81; *Breese v. United States*, 203 Fed., 824, 831.

Moreover, the prayer as submitted carried the implication that the jury must find that all of the overt acts were established and proved, when, as a matter of law, only one is required. *Bruno v. United States*, 67 F. (2d) 416, 417. Also, the requirement that the appellant must have had a "full" knowledge of the unlawful agreement is more than the law demands.

It is submitted that the court's charge, and particularly defendant's prayer No. 4 (Rec. 282) gave the appellant all of rejected prayer No. 5 to which he was entitled.

PRAYER NO. 9

The first sentence of this prayer is entirely proper. This sentence is as follows:

The court instructs the jury, as a matter of law, that you should look upon the defendant as an innocent man, and if the jury can harmonize all the testimony in this case with a reasonable hypothesis of his innocence, then their verdict should be not guilty (Rec. 288).

The presumption of innocence which is stated in the first portion of this sentence was fully covered by the court's charge and by defendant's prayer No. 1 (Rec. 281). The substance of the latter part of the sentence was given by the court to the jury in the following language:

If you can reconcile the evidence with any reasonable hypothesis consistent with the innocence of the defendant, you should do so. And in that case your verdict should be not guilty (Rec. 284).

This is the usual and typical charge in this regard and the appellant was not entitled to paraphrase this principle of law by inserting in lieu of the words "with a reasonable hypothesis of his innocence" the words "with the possibility of his innocence."

PRAYER NO. 10

Appellant in attempting to quote this prayer on pages 24 and 25 of his brief has omitted the last

sentence thereof: therefore the prayer is quoted in full as follows:

The court instructs the jury as a matter of law, that you should look upon the defendant as innocent. If the jury can harmonize all the testimony in this case with a reasonable hypothesis of his innocence then your verdict should be not guilty.

In other words if you can harmonize all the testimony with the reasonable probability of his innocence your verdict should be not guilty (Rec. 289).

The first paragraph of this prayer is substantially the same as the first sentence of prayer No. 9, *supra*, the substance of which as stated above was given by the court to the jury in its charge.

The second paragraph of this prayer has the same vice that is contained in the latter part of prayer No. 9, the word "probability" appearing in place of the word "possibility."

With respect to all three of these prayers, it is submitted that any and all accurate statements of the law contained therein were given by the court to the jury in its general charge. Hence, appellant has no ground of complaint. Compare *Mendelson v. United States, supra*, p. 129.

CONCLUSION

Before concluding this brief, it is felt that appellant's discussion under the title of "A most remarkable condition of proof exists in this case" should

be commented upon. The theme of this point is that some employees of the Bank, who were called chiefly by the Government to identify records, also testified that they found nothing irregular in appellant's transactions while he was at the Bank. Such testimony is not at all unusual for three reasons: first, because they handled separate items and it required a co-ordination of a number of them to demonstrate their fictitious character; secondly, by far the greater portion of the Government's evidence covered the period after appellant left the Bank; and thirdly, the crimes charged are conspiracies, and Stunz' irregular transactions are imputable to appellant and his father under the circumstances of this case.

Moreover, in respect of this matter, as well as all matters of defense offered by the appellant, our answer is that these were all questions of fact for the jury to pass upon. As this Court said in *Mendelson v. United States, supra*, at page 131:

It is not for an appellate Court to weigh the evidence and review the decision of the jury on a disputed question of fact. If there is substantial evidence to support the verdict, we have no other duty than to affirm. * * * The jury were in better position than we are to draw correct inferences from the facts shown and then to judge correctly from these facts and inferences his (one of the defendants) part in the common enterprise.

For the foregoing reasons, it is respectfully submitted that there is no error in this record, and the judgment of the lower court should, therefore, be affirmed.

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